# DOCKET

No. 86-728-CFX
Status: GRANTED

Title: Bill Honig, California Superintendent of Public Instruction, Petitioner
v.
John Doe and Jack Smith

Docketed:
November 3, 1986

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Rubin,Asher

Counsel for respondent: Brogna,Sheila Louise

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Sep 17 1986 | | Application for extension of time to file petition and order granting same until November 8, 1986 (Rehnquist, September 18, 1986). |
| 2 | Nov 3 1986 | G | Petition for writ of certiorari filed. |
| 3 | Dec 3 1986 | | DISTRIBUTED. January 9, 1987 |
| 4 | Dec 5 1986 | X | Brief of respondent John Doe and Jack Smith in opposition filed. |
| 5 | Dec 22 1986 | | Record requested. |
| 7 | Jan 20 1987 | | Record filed. |
| 8 | Jan 20 1987 | | Certified copy of original record & proceedings, 8 volumes, received. (Box). |
| 9 | Feb 6 1987 | | REDISTRIBUTED. February 20, 1987 |
| 10 | Feb 5 1987 | | Record filed. |
| 11 | Feb 5 1987 | | Certified copy of briefs received. |
| 12 | Feb 23 1987 | | Petition GRANTED. limted to Questions 1 and 3 presented by the petition. |
| | | | ********** |
| 14 | Mar 30 1987 | | Order extending time to file brief of petitioner on the merits until April 30, 1987. |
| 15 | Apr 3 1987 | | Brief amicus curiae of Davis Joint Unified School District, et al. filed. |
| 16 | Apr 6 1987 | | Brief amicus curiae of National School Boards Assn. filed. |
| 17 | Apr 23 1987 | | Brief amicus curiae of Natl. School Safety Center filed. |
| 18 | Apr 29 1987 | | Joint appendix filed. |
| 19 | Apr 29 1987 | | Brief of petitioner Honig, CA Supt. of Pub. Instruction filed. |
| 21 | Apr 27 1987 | | Order extending time to file brief of respondent on the merits until June 22, 1987. |
| 22 | Apr 30 1987 | G | Motion of San Francisco Unified School District for leave to file a brief as amicus curiae filed. |
| 23 | Apr 30 1987 | | Brief amicus curiae of United State filed. |
| 24 | May 12 1987 | G | Motion of respondents to seal the record filed. |
| 25 | May 12 1987 | G | Motion of respondents to seal the joint appendix filed. |
| 26 | May 12 1987 | G | Motion of respondents for leave to proceed further herein in forma pauperis filed. |
| 27 | May 18 1987 | | Motion of San Francisco Unified School District for leave to file a brief as amicus curiae GRANTED. |
| 28 | May 12 1987 | D | Motion of Davis Joint Unified School District, et al. for leave to participate in oral argument as amici |

No. 86-728-CFX

| Entry | Date | Note | Proceedings and Orders |
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| | | | curiae, for divided argument and for additional time for oral argument filed. |
| 29 | May 14 1987 | | Opposition of respondents to motion of Davis Joint Unified School District, et al. for leave to filed. |
| 30 | May 12 1987 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 31 | May 19 1987 | | DISTRIBUTED. June 4, 1987. (Motion to seal the record, motion to seal joint appdx. and motion of respondents |
| 32 | May 19 1987 | | for leave to proceed further herein IFP). |
| 33 | May 26 1987 | | Motion of Davis Joint Unified School District, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED. |
| 34 | May 26 1987 | | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| 35 | Jun 8 1987 | | Motion of respondents for leave to proceed further herein in forma pauperis GRANTED. |
| 36 | Jun 8 1987 | | DISTRIBUTED. June 11, 1987. (Motion of respondents to seal joint appendix and seal the record). |
| 40 | Jun 5 1987 | | Response of petitioners to motions to seal the record and the joint appendix filed. |
| 41 | Jun 15 1987 | | Motion of respondents to seal the record GRANTED. |
| 42 | Jun 15 1987 | | Motion of respondents to seal the joint appendix GRANTED. |
| 43 | Jun 22 1987 | | Brief amicus curiae of American Assn. on Mental Deficiency, et al. filed. |
| 44 | Jun 22 1987 | | Brief amicus curiae of Natl. Assn. of Protection and Advocacy, et al. filed. |
| 45 | Jun 22 1987 | | Brief amicus curiae of Center for Law and Education, et al. filed. |
| 46 | Jun 22 1987 | | Brief amicus curiae of Senators Chafee, et al. and Rep. Biaggi, et al. filed. |
| 47 | Jun 22 1987 | | Brief of respondent John Doe and Jack Smith filed. |
| 48 | Jun 22 1987 | | Lodging from respondent received and recorded. |
| 49 | Jun 22 1987 | | Brief amicus curiae of Legal Aid Society of NY, et al. filed. |
| 50 | Jul 17 1987 | | Joint appendix filed. |
| 51 | Jul 20 1987 | | CIRCULATED. |
| 52 | Aug 31 1987 | | SET FOR ARGUMENT. Monday, November 9, 1987. (2nd case). |
| 53 | Oct 3 1987 | X | Reply brief of petitioner Honig, CA Supt. of Pub. Inst. filed. |
| 54 | Oct 14 1987 | G | Motion of the Solicitor General to permit Glen D. Nager, Esquire, to present oral argument pro hac vice filed. |
| 55 | Oct 19 1987 | | Motion of the Solicitor General to permit Glen D. Nager, Esquire, to present oral argument pro hac vice GRANTED. |
| 56 | Nov 9 1987 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

86-728

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. A-214

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

BILL HONIG, CALIFORNIA SUPERINTENDENT
OF PUBLIC INSTRUCTION,
*Petitioner,*

VS.

JOHN DOE AND JACK SMITH
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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145pp

## QUESTIONS PRESENTED

1. Whether the "stay put" provisions of the Education for All Handicapped Children Act, Pub.L. 94-142, preclude a local school district from immediately changing the placement of a child whose handicap-related behavior endangers himself or others.

2. Whether an evaluation of a handicapped pupil's needs must be made before a significant change can be made in the programs or services available to him.

3. Whether the state must provide direct services to each individual handicapped child with respect to whom the local school district has faltered in the discharge of its responsibilities.

## PARTIES

The original plaintiff in the case was a handicapped student, John Doe. Jack Smith, also a handicapped student, later intervened as a plaintiff. The defendants were Wilson Riles, former California Superintendent of Public Instruction, Bill Maher. Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as members of the San Francisco Unified School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, individually and in his capacity as chairperson of the Student Placement Committee of the San Francisco Unified School District, and Henry Caruso, individually and in his capacity as principal of the Louise Lombard School in the San Francisco Unified School District.

The petitioner before this Court is Bill Honig, successor to Wilson Riles. See Supreme Court Rules, rule 40.3. The local school district officials are not a party to this petition.

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No. A-214

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VS.

JOHN DOE AND JACK SMITH
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 793 F.2d 1470 and is reproduced at Appendix A. The prior decisions and judgments of the district court are unpublished. The decision which concerns petitioner is reproduced at Appendix B.

## JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 11, 1986, affirming in part, reversing in part, and modifying in part the judgments of the United States District Court for the Northern District of California dated December 2, 1983, April 23, 1984, and May 24, 1984. On September 18, 1986 Mr. Chief Justice Rehnquist signed an order extending the time for filing this petition for certiorari to and including November 8, 1986. This court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case principally involves the Education for All Handicapped Children Act, Pub.L. 94-142, 20 U.S.C. section 1401 et seq. reproduced at Appendix C, and certain portions of its analog regulations, 34 C.F.R. Part 300. The relevant sections of Part 300 are reproduced at Appendix D.

## STATEMENT OF THE CASE

### A. Facts Concerning Plaintiffs

(1) In 1980 John Doe, a minor with serious emotional problems, was discharged from a California state mental hospital. Shortly afterward an individualized education program was prepared for him in anticipation of his Fall entry into the San Francisco Unified School District program for handicapped students. Following his enrollment in a school run by the district, on November 6, 1980 Doe had a violent outburst in the course of which he tried to choke another student and broke a plate glass window. This was the second time he had attacked a student. Doe's conduct arose out of his handicap.

Doe was immediately suspended although the district did provide him with home instruction during his suspension. Meanwhile, the district commenced procedures to determine whether Doe should be expelled. Doe's mother was notified. Before these procedures could be completed, Doe brought an action in federal district court alleging that the procedures were defective and that his extended suspension violated his rights under the EAHCA. Pursuant to a preliminary injunction issued by the district court, Doe returned to school on December 15.

(2) Jack Smith had been on a half-day program which was changed to full time on a trial basis. When it was determined that he could not handle his load the district cut him back to a part day; this was consistent with his individualized education program (IEP). Smith thereafter engaged in repeated acts of theft, extortion, and sexual advances to female students. He was suspended, during which he received home instruction, and was eventually



placed in a private school. At no time was he recommended for expulsion.

The Ninth Ciruit found that Smith's reduction to a part day program was appropriate but that the district failed to give the requisite notice of this step to Smith's grandparents. Accordingly, the court excused Smith from exhausting administrative remedies.

### B. The District Court Opinions

On October 24, 1983 the district court issued a declaration and permanent injunction with respect to the local defendants. On April 23, 1984 the district court also issued a decision granting declaratory and injunctive relief against the state defendants. That decision went far beyond the facts of the case; the district court issued a wideranging opinion delineating all of the duties of the state superintendent of public instruction with respect to the discipline of handicapped children. The court ruled *inter alia* that:

1. Where misconduct by a handicapped child is a manifestation of his handicap he cannot be expelled or deprived of educational services;

2. Before any significant changes are made in a child's educational placement or program or the services provided to him, the child shall have the right to a "comprehensive evaluation";

3. Whenever a change of placement or program is recommended as a result of a child's misconduct the child shall have a right to have a multidisciplinary team convene within five school days of the initiation of disciplinary action;

4. The child has the right to remain in his current placement pending all EAHCA procedures, including all administrative and judicial reviews;

5. A handicapped child who misbehaves may only be suspended for five consecutive days;

6. Decisions of the IEP team shall be based on majority rules;

7. The state must provide services directly when in any individual case a local educational agency is unable or unwilling to establish and maintain such programs or services.

### C. The Ninth Circuit Opinion

The local school district appealed from the December 2, 1983 declaratory judgment and injunction against it. The state defendant, petitioner here, appealed from the April 23, 1984 judgment and injunction and the plaintiffs filed a cross appeal from a district court order of May 24, 1984. The appeals were consolidated in the Ninth Circuit.

Relying on *Smith v. Robinson,* 104 S.Ct. 3457 (1984) the Ninth Circuit ruled that the plaintiffs' claims were not cognizable under section 504 of the Rehabilitation Act of 1973. Slip op. 8-9. The Ninth Circuit affirmed the district court's ruling that a handicapped student whose misbehavior is a manifestation of his handicap may not be expelled from school. The court noted, however, that where the child's misbehavior is determined not to be a result of his handicap the child may be expelled. Slip op. 14. The court rejected the district court's decision to limit suspensions to 5 days, ruling that suspensions for 20 and in some cases 30 consecutive days were permissible. Slip op. 21. The court further ruled that there are no exceptions to the "stay put" provisions of 20 U.S.C. section 1415(e)(3) and affirmed the district court's holding that the child must be maintained in his placement during the course of all review proceedings. It distinguished the cases of *Jackson v. Franklin County School Board,* 765 F.2d 535 (5th Cir. 1985) and *Victoria L. v. District School Board,* 741 F.2d 369 (11th Cir. 1984). Slip op. 24.

The court also affirmed the district court's ruling that an evaluation must be made before a significant change is made in the handicapped child's program or the services afforded that child. Slip op. 27. On two other points the Ninth Circuit reversed the trial court, holding that the meeting of the IEP team need not be held within five days of the disciplinary action, slip op. 30, and that the IEP team should work by consensus rather than by majority rules. Slip op. 32-34.



The Ninth Circuit also addressed the question of exhaustion of administrative remedies and found that in this case exhaustion would be excused. Slip op. 35-36.

Dealing with the responsibilities of the state the Ninth Circuit affirmed the district court's ruling that the state must provide services directly *to an individual child* where the local educational agency fails to adhere to the requirements of the EAHCA. Slip op. 38-39.

Finally, the court affirmed the district court in its rulings concerning damage claims, finding that the state defendant was not liable in damages. Slip op. 41-48.

The Ninth Circuit opinion is lengthy and complex with a variety of holdings and dicta. In this petition, however, we are focusing only on those issues described in the "Questions Presented" section of this petition.

## REASONS FOR GRANTING THE WRIT

### A. The Ninth Circuit's Decision Conflicts With Those Of Other Circuits

The Ninth Circuit states that there are no exceptions to the requirement of 20 U.S.C. section 1415(e)(3) that a student must be maintained in his current placement while review proceedings are pending. Slip op. 24. It states that a disruptive student may be suspended for a fixed term and may be disciplined in other ways but that his placement may not be changed while he challenges the proposed alteration to his educational program. Slip op. 24-25.

The court's ruling is in direct conflict with the First, Fifth and Eleventh Circuits.

#### (1) First Circuit

Although the facts in *Doe v. Brookline Sch. Comm.* (1st Cir. 1983) 722 F.2d 910 were different from those here, the First Circuit in that case was called upon to interpret the "current placement" provision in 20 U.S.C. section 1415(e)(3). The court said,

> "We do not believe Congress intended to freeze an arguably inappropriate placement and program for the three to five years of review proceedings." 722 F.2d at 918.

In contrast to the Ninth Circuit's ruling here, the First Circuit concluded that the (e)(3) provision was directory and not mandatory and that a court had the power to change a placement or grant other equitable relief irrespective of the pendency of review proceedings. 722 F.2d at 918.

**(2) Fifth Circuit**

In *Jackson v. Franklin County Sch. Bd.* (5th Cir. 1985) the plaintiff was a 17-year old student with a learning disability. He unbuttoned a female student's blouse and touched her breasts. He was suspended briefly and then sent to a state hospital for psychiatric evaluation. During the time that the school board sought to devise an appropriate educational program for him and while his EAHCA challenges were pending, Jackson sought to be readmitted to the school. The board refused to admit him and the federal district court likewise denied relief. The Fifth Circuit affirmed, ruling that there *is* an exception to the "stay put" EAHCA requirement when the student "endangers himself or others or threatens to disrupt a safe school environment." 765 F.2d at 358. See also *S-1 v. Turlington* (5th Cir. 1981) 635 F.2d 342, 348 n. 9.

**(3) Eleventh Circuit**

In the case of *Victoria L. v. Dist. Sch. Bd.* (11th Cir. 1984) 741 F.2d 369, the plaintiff was a handicapped student who brought a razor blade and a martial arts weapon to school and threatened to injure or kill another student. 741 F.2d at 371. The appellate court gave short shrift to the plaintiff's contention that she was entitled to stay in her current placement while her EAHCA procedures were pending. In denying relief the court said, "Congress had no intent to deprive local school boards of their traditional authority to insure a safe school environment." 741 F.2d at 374.



**B. The Ninth Circuit's Holding That A Handicapped Child Must Be Maintained In His Current Placement Despite Behavior Which May Be Dangerous To Himself Or Others May Have Disastrous Consequences**

20 U.S.C. section 1415(e)(3) provides:

> "During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed."

The quoted section is the so called "stay put" provision of the Act. As we noted above, the Ninth Circuit's holding concerning this provision conflicts with holdings in other circuits. More important, its mechanistic position defeats one of the purposes of the Act. The court stated, " . . . section 1415(e)(3) does not list any exceptions to its automatic injunction." Slip op. 24. In other words the Ninth circuit holds that so long as any EAHCA review proceedings are pending, presumably including court proceedings, the child must be kept in his current placement.

The court apparently realized, however, that keeping a disruptive child in a classroom could have terrible consequences. In dealing with this problem the court noted that the school authorities could use their usual disciplinary measures, which would include a brief period of suspension, and that in "truly exigent circumstances" school authorities could seek judicial relief. The problem with this ruling is that after interim disciplinary measures have been taken, the child must be returned to the classroom even if it is clear that he will commit violent and disruptive acts which may well endanger other children and school property. Thus, any judicial relief rendered by a district court would have only limited utility.

We do not believe that Congress intended that school authorities faced with disruptive and violent behavior by a child, would be required to keep the child in the classroom while EAHCA

proceedings are pending. It shouldn't matter whether the child is handicapped or not or whether his conduct is a manifestation of his handicap. Where school authorities are confronted with a child who sexually molests other children (*Jackson*) or brings a razor to school and threatens classmates (*Victoria L.*) or chokes another student (this case) they must be able to act in a way which will guarantee the safety of other children and the integrity of school property. In some cases a brief suspension might be adequate. In other cases, however, an interim change of placement might be appropriate, particularly when the conduct is likely to recur or the severity of past incidents makes it imprudent for school authorities to even take a chance that such conduct will recur.

This case provides a good example. John Doe attacked another student and broke a plate glass window in 1980. The review proceedings, including court proceedings, have now been pending for some six years.[1] Under the Ninth Circuit's view, while Doe could be suspended briefly, he would otherwise be entitled to remain in his placement for the entire six years. That simply doesn't make sense. A school district should not have to shoulder the responsibility of protecting other students by providing a guard or a paid monitor in the classroom while a violence-prone child spends six or seven years challenging the educational program designed for him.

It is true that section 1415(e)(3) does say "the child *shall* remain in the then current educational placement." (Emphasis added.) We would submit, however that the word "shall" in this context should not be construed as mandatory. Congress cannot be deemed to have made such placements mandatory where the lives of other children might be endangered. The statute must be interpreted in a way which makes sense, a way which recognizes that the child ordinarily will be maintained in his placement but that an exception exists where safety is a critical factor.

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[1] One might reasonably be curious about Doe's behavior during this period. If necessary, we could augment the record to show that he was confined to a state mental hospital following incidents of serious social misconduct.



In determining whether language in a statute is intended to be mandatory or directory a number of considerations apply. First, of course, is the legislative history. In this case what history there is supports our view that the language of the statute is directory only. Senator Stafford, a major sponsor of the Act, commented,

> "We did feel however that the placement or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus, the conference adopted a *flexible approach* to try to meet the needs of both the child and the State." 121 Cong. Rec. 37412 (November 19, 1975).[2] (Emphasis added.)

Second, our position is supported by recognized canons of statutory construction. In his treatise, Sutherland states,

> "The courts will apply that construction which best carries into effect the purpose of the statute under consideration in order to determine whether the statute is mandatory or directory.... The ordinary meaning of language may be overruled to effectuate the purpose of the statute." 2(a) Sutherland, *Statutory Construction*, 4th ed. 1974, p. 650. See also discussion at pp. 656, 658.

Finally, the stay put provision should be harmonized with 20 U.S.C. section 1412. While the latter statute is directed chiefly at mainstreaming, it does show a Congressional awareness that in some situations it is unwise to require that a handicapped child remain in any particular placement. The section requires the state to establish "procedures to assure that, *to the maximum extent appropriate*, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, *or other removal* of handicapped children from the regulâr eductional environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (Emphasis added.) The italicised language demonstrates that Congress intended to give educators flexibility in making placement decisions.

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[2] Quoted in *Doe v. Brookline School Comm., supra*, 722 F.2d at 918.

In the instant case and cases like it the children involved act with explosive unpredictability. It is impractical to have them watched throughout the school day by trained personnel. In many cases placements must be changed not as a punitive measure but as a protective one. Prohibiting such a change pending lengthy review proceedings does a disservice to the child himself as well as to the other children whose safety may well be imperiled by his conduct.

### C. The Court's Holding That An Evaluation Must Be Made Prior To Any Significant Change Of Program Or Services Will Hinder Efforts To Assist Handicapped Children

The evaluation procedure contemplated by the EAHCA and the accompanying federal regulations is an elaborate process. It involves student-specific testing by a multi-disciplinary team which must be capable of assessing all areas related to the suspected disability. See 34 C.F.R. section 300.532. See also Cal. Ed. Code section 56320. The process is technical and time-consuming and requires the martialing of considerable human resources. It should not lightly be invoked.

The EAHCA and the regulations require that handicapped children be evaluated only upon initial placement. 20 U.S.C. sections 1412(b) and 1414(a)(1)(A); 34 C.F.R. section 300.530.[3] The Ninth Circuit, however, holds that an evaluation must also be made each time there is a "significant change of program or services" for a handicapped child. Slip op. 27. In support of this ruling the court relies in part on 34 C.F.R. section 104.35. *Id.* The fact is that the regulation cited is not involved in this case; that regulation applies only to the Rehabilitation Act of 1973. See 34 C.F.R. section 104.1 which states, "The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973 . . . " Since the Ninth Circuit had already ruled that "plaintiffs' claims are not cognizable under section 504," slip op. 9, it clearly relied upon the wrong authority in citing 34 C.F.R. section 104.35.

[3] The child's individualized education program is updated annually or more often, 20 U.S.C. section 1414(a)(5), but that is different from the evaluation requirement.



Our quarrel is not only with the Ninth Circuit's citation of erroneous authority but with its addition of a requirement which is nowhere mandated by the EAHCA or the federal regulations. The invention of the additional evaluation requirement will severely hinder educators' efforts to design and fine-tune educational programs for handicapped children.[4] Educational authorities must have flexibility to alter programs and services for a handicapped child to accommodate changes in his physical or mental condition. They must be free to change the child's curriculum or add or delete a particular service for the child. The lack of such flexibility will chill the exercise by educators of initiative and pedagogical judgment.

Parenthetically, we should add that there are no standards which define what is a "significant" change in a child's program or services. The use of this vague term invites controversy and litigation.

### D. The Ninth Circuit's Holding That A State Must Provide Direct Services Where A Local School District Falters In An Individual Case Will Place An Intolerable Burden On The States

20 U.S.C. section 1414(d) reads as follows:

> "(d) Special education and related services provided directly by State educational agencies; regional or State centers
>
> Whenever a State educational agency determines that a local educational agency—
>
> (1) is unable or unwilling to establish and maintain programs of free appropriate public education which

[4] The Ninth Circuit's opinion may also be read as casting doubt on the concept of a flexible IEP. For example, plaintiff Smith's IEP called for possible changes in Smith's schedule, depending on his performance. This was agreed to by Smith's grandparents. Yet, when the district cut Smith's schedule back to a part-day in conformity with his IEP, this step, according to the court, could have been challenged through invocation of EAHCA due process procedures. See slip op. 35-36.

meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter."

As we read that section, subparts (d) (1) and (2) require the state to establish a program for handicapped children when a local school district fails to have a program in place for children within its jurisdiction.

Subpart (d) (3) refers to the situation where a school district is not equipped to deal with a severely handicapped child who would be better served by attending a school like the State School for the Deaf or the State School for the Blind, or a similar special institution.

The Ninth Circuit has erroneously used language in subpart (d) (3) of the statute to justify a holding relating to subpart (d) (1). The court holds that where a school district is unable or unwilling to provide services to an *individual* child, the state must provide those services directly. The court said,

> "Although the state has broad responsibilities under the EAHCA, they are not absolute. It is not obliged to intervene directly in an individual case whenever the local agency falls short of its responsibilities in some small regard. The breach must be significant (as in this case), the child's parents or guardian must give the responsible state officials adequate notice of the local agency's noncompliance, and the state must be afforded a reasonable opportunity to compel local compliance." Slip op. 39.



With due respect, we believe this holding amounts to legislating by the court. While the court might be trying to soften its directive to the state, nothing in the statute sets forth the procedural sequence which the Ninth Circuit has adumbrated.

It can hardly be doubted that in subparts (d) (1) and (2) Congress was speaking not of programs for individual children but rather district-wide programs which would be established for children in the area served by the local educational agency. Note that the sections themselves speak in terms of "programs" and "children residing in the area". Similar language is found in the conference report. Senate Conference Report No. 94-455, reprinted at U.S. Code Cong. & Admin. News, 94th Cong. 1st Sess. (1975), p. 1497. And in the comments to the relevant regulations the federal government notes, "If a local educational agency elects not to apply for its Part B entitlement, the state would be required to use those funds to insure that free appropriate public education (FAPE) is made available *to children residing in the area* served by that local agency." See comment to 34 C.F.R. section 300.360. (Emphasis added.)

It does not make sense to require a state to step in where an individual child who participates in a district-wide program for handicapped children has encountered difficulty with local educational officials. Where that does occur, the child's parent or guardian has adequate remedies under the due process provisions of the statute. 20 U.S.C. section 1415.

The Ninth Circuit is saying, essentially, that the remedies of 20 U.S.C. section 1415 may be bypassed, that a child dissatisfied with local school district action may compel the state to provide him services directly. But that is not what Congress intended and the statute contains no such election of remedies.

Let us suppose that a child who has a severe motor impairment is denied services by a local district. Congress has said that in that

situation he may request an administrative hearing. If he does not obtain relief administratively he may go to federal district court. Moreover, if time is a problem there is no reason why the child could not go immediately to district court and obtain a mandatory injunction to compel the local district to accord him the educational services to which he is allegedly entitled.

Nowhere is there any indication that Congress intended to allow students to ignore section 1415 and choose to receive state services directly. Forcing the state to provide such services automatically is tantamount to prejudging the district's conduct. It may be that the district has a good reason for denying services, that the parents of the child, for example, falsified their statement of residence and do not actually live within the district. The point is that a cessation of services or a district's refusal to provide them should not ipso facto trigger provision of services by the state. Rather, these questions should be decided through the orderly procedures set forth in 20 U.S.C. section 1415.

In any event, the state is hardly geared to provide direct services on an immediate basis. It has no roving teams of trained personnel who can set up shop in a district on a moment's notice and deliver specialized services to a child. The state would be compelled to contract with appropriate individuals in the district where the child resides. This could well entail competitive bidding, adherence to affirmative action requirements, Department of Finance approvals, and similar administrative procedures. Such awkward ad hoc arrangements would precipitate confusion and delay the delivery of services, a result which is obviously *not* what Congress intended.

Direct action by the State would be appropriate where, for example, a district becomes financially insolvent and is unable to run a program for handicapped children. Or where a district makes a conscious decision not to operate a program because it is administratively difficult to do so. In such cases, the state could establish a program at a central location within the district, staff it appropriately, and operate it in an efficient manner with a view toward its long term retention.



## CONCLUSION

It has been said that "this Ninth Circuit decision seems likely to set the guidelines for discipline of handicapped students for the foreseeable future." Education for the Handicapped Law Report, Aug. 15, 1986, p. SA-234. That would be unfortunate since the decision is wrong on a number of critical points.

The importance of correct guidelines in the area of discipline of handicapped students is manifest. We respectfully urge this Court to take the case in order to clarify the duties and correlative rights of educational officials who are attempting to serve handicapped students, guarantee the safety of others in the classroom, and discharge their EAHCA obligations.

DATED: October 24, 1986

Respectfully submitted,

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## APPENDIX A

Decision of the Ninth Circuit Court of Appeals
793 F.2d 1470

John DOE, by his guardian ad litem Pauline GONZALES,
Plaintiff/Appellee/Cross-Appellant,

and

Jack Smith,
Plaintiff/Intervenor/Cross-Appellant,

v.

William MAHER, et al.,
Defendants/Appellants,

and

Wilson Riles, etc., et al.,
Defendants/Appellants/Cross-Appellees.

Nos. 83-2613, 84-1984 and 84-2080.

United States Court of Appeals,
Ninth Circuit.

Argued Oct. 9, 1985.

Submitted Nov. 27, 1985.

Decided July 11, 1986.

Before SNEED, SCHROEDER and BRUNETTI, Circuit Judges.

SNEED, Circuit Judge:

The California Superintendent of Public Instruction (State Superintendent), the San Francisco Unified School District (SFUSD), the Superintendent of the SFUSD, and various other school officials appeal the expansive declaratory judgments rendered, and the injunctions imposed, by the district court pursuant to the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401-1461 (1982), and section 504 of the Rehabilitation Act (section 504), 29 U.S.C. § 794 (1982), in favor of appellees John Doe and Jack Smith, two emotionally handi-

capped students.[1] Doe and Smith cross appeal the district court's dismissal of their damage claims against the State Superintendent.

We affirm in part, reverse in part, and modify in part.

## I.
## INTRODUCTION AND OUTLINE

This is a case affected by deep and strong emotional currents and fundamental civic concerns. In brief, it concerns the education of children, particularly handicapped children. It teaches that those who serve by educating both the handicapped and the non-handicapped must accept an increment to their already not insubstantial bureaucratic yoke, that those who love their children must sometimes make sacrifices in order to accommodate the interests of other children and their equally loving parents, and that those of us who administer the law must recognize the limits of our capacity to achieve perfect justice.

Because our opinion is lengthy, understanding will be advanced by outlining its structure. It is divided into seven parts, not counting this introduction and a brief conclusion. these are as follows:

II. Facts and Procedural Background

III. Analysis of the Applicable Statutory Structure

IV. District Court Rulings Regarding Disciplinary Matters

V. District Court Rulings Regarding Placement Procedures

[1] The district court's unpublished declaratory judgments and injunctions against the SFUSD, *see* C.R. item 272, and the state, *see* C.R. item 304, are reproduced in the appendices to this opinion. Because we consider the terms of these documents in some detail, the reader's understanding of this opinion will be greatly enhanced by frequent reference to them.



VI. District Court Rulings Regarding the Reduction of Smith's Schedule

VII. District Court Rulings Affecting Duties of the State

VIII. Disposition of Plaintiffs' Damage Claims

## II.
## FACTS AND PROCEDURAL BACKGROUND

Appellee John Doe is an emotionally disturbed child with aggressive tendencies in certain circumstances. This condition renders him handicapped within the meaning of both the EAHCA[2] and section 504 of the Rehabilitation Act.[3] All parties agree that he is entitled to whatever protections those statutes afford. Pursuant to an individualized educational program (IEP) designed for Doe in April 1980, the SFUSD placed him at the Louise Lombard School (Louise Lombard), a developmental center for the handicapped.

On November 6, 1980, Doe assaulted another student and broke a school window. When interviewed by the school principal, Henry Caruso, Doe admitted his misconduct. Caruso suspended Doe for five days, until November 14. On that date Doe, his mother, and their attorney met with Caruso to discuss the suspension. Caruso referred Doe to the Student Placement Com-

[2] The EAHCA defines "handicapped children" as mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.
20 U.S.C. § 1401(a)(1) (Supp. I 1983).

[3] For purposes of section 504 (as applied in the context of education), "handicapped individual" means

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(7)(B) (1982).

mittee (SPC),[4] with the recommendation that he be expelled. On the day of the conference with Caruso, the SPC notified Doe's mother by letter that it was recommending Doe's expulsion[5] from the SFUSD, but that she had the right to a conference with the SPC on November 25. The SPC also continued Doe's suspension indefinitely. This was done in reliance on former California Education Code § 48903(h), which allowed an extension of suspension beyond five days pending the resolution of expulsion proceedings.[6]

Doe's counsel by letter objected to the use of these procedures on the ground that they violated the EAHCA. He asked the SFUSD to cancel the expulsion hearing and convene an IEP Team. The SFUSD ignored this request and Doe sought relief in the district court. On November 24, the day before the scheduled conference with the SPC, the SFUSD agreed to cancel the expulsion proceeding against Doe. The district court issued a temporary restraining order on December 2 that directed the SFUSD to readmit Doe to the Louise Lombard School. *See* Court Record (C.R.) item 11. On December 10, the court issued a preliminary injunction enjoining the SFUSD from excluding Doe from Louise Lombard while efforts were being made to find him an alternative placement pursuant to his IEP recommendation. *See id.* item 40. Doe finally returned to Louise Lombard on December 15.

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[4] The SPC bears responsibility for making the initial determination whether a student should be expelled. Its decision is then reviewed by the school board.

[5] The California Education Code uses two terms—"Expulsion" and "exclusion"—to refer to action whereby the school district ceases providing services to students either permanently or for an extended period of time. Although some provisions of the Code use one term and some use the other, we can discern no relevant distinction between them for our purposes here. Thus, we use them interchangeably except where quoting from state statutes.

[6] Former Education Code section 48903(h) has been substantially incorporated into the current Education Code at section 48911(g).



Appellee Jack Smith, like appellee Doe, has a propensity for aggressive behavior and is emotionally handicapped within the meaning of the EAHCA and section 504. In February 1980, an IEP team recommended that Smith be given a special education placement in a regular school setting at A.P. Giannini School (A.P. Giannini). His then-current IEP stated that "[t]his program is on a trial basis dependent upon [Smith's] ability to adapt to a regular school." With this IEP, Smith entered A.P. Giannini in September 1980. Following a number of incidents of misbehavior on Smith's part, the school unilaterally decided on October 14 to reduce his program to a half-day schedule. At some point, his grandparents agreed to the reduction. However, school officials appear never to have apprised them of their right to challenge the reductions, or of the other safequards available to them under the EAHCA.

On Novermber 14, Smith made sexual comments to several female students. Smith admitted these acts to the school principal, who suspended him for five days and referred him to the SPC for expulsion. By a letter dated November 21, the SPC notified Smith's grandparents that it was recommending to the school board that Smith be expelled from the SFUSD and also that a conference was set for December 2. As in Doe's case and in reliance on former California Education Code § 48903(h), the SPC also continued Smith's suspension pending resolution of the case.

On November 28, in a letter to the SPC, Smiths's counsel objected to the expulsion proceedings. On December 1, the SPC cancelled the December hearing and offered either to restore Smith to his half-day program at A.P. Giannini or to provide him with home tutoring. Because the SPC refused to allow Smith to return to his full-day program as requested, his grandparents chose home tutoring. Home instruction began on December 10, and an IEP team convened on January 6, 1981. Smith's counsel became aware of Doe's suit and petitioned the district court for leave to intervene. The court granted the request on February 27, 1981.

The claims raised by Doe and Smith are similar. Each complains of extended suspension pursuant to the initiation of expul-

sion claims. Smith complains of the reduction of his program to a half-day schedule. Each also asserts violations of the EAHCA, section 504 of the Rehabilitation Act, and various wrongs actionable under 42 U.S.C. § 1983.

The claims against the SFUSD were predicated upon the direct action taken by district officials against Doe and Smith. The claims against former State Superintendent of Public Instruction, Wilson Riles, were based on his alleged failure (1) to establish a policy regarding the discipline of handicapped students, (2) to monitor the SFUSD's compliance with the EAHCA, and (3) to intervene when the SFUSD deprived Doe and Smith of their rights under the EAHCA. The plaintiffs prayed for injunctive and declaratory relief, as well as damages, against all the defendants in their official and individual capacities.

On May 25, 1982, in the course of pretrial discovery, the district court issued an opinion stating, in part, that the Eleventh Amendment barred all recovery of damages against the State Superintendent, but that damages would be available against the SFUSD defendants under section 1983 and section 504. *See* C.R. item 155. On June 17, 1983, the court granted plaintiffs' motion for Partial Summary Judgment against the SFUSD defendants, and the parties promptly entered into a settlement whereby Doe and Smith released the SFUSD defendants from all damage liability in exchange for $1600 each. Finally, on December 2, 1983, the court issued a declaratory judgment and permanent injunction against the SFUSD. *See* C.R. item 272, *reprinted in* Appendix A, *infra*.

Litigation against the State Superintendent was more protracted. On July 11, 1983, the court denied the plaintiffs' summary judgment motion against the State Superintendent on the ground that several factual issues remained to be resolved. Sixteen days later, the court granted the State Superintendent leave to amend his complaint to plead good-faith immunity from the claims against him in his individual capacity and sovereign immunity from the claims against him in his official capacity. *See* C.R. item 252. Doe and Smith immediately filed a proposed discovery plan, but the court denied the proposal for the reason that the plaintiffs had not stated, and could not state, a claim



against the State Superintendent in his individual capacity, and that further discovery would not serve to advance their claims against him in his official capacity. *See* C.R. item 265.

These skillful managerial steps by the district court brought into focus the injunctive relief sought by Doe and Smith. The parties filed cross-motions for summary judgment on January 9, 1984, and on April 23, 1984, the court found in favor of the plaintiffs. Its quite lengthy and comprehensive declaratory judgment and permanent injunction repeated the terms of the prior decrees against the SFUSD. The court also directed the state to provide services directly when, in any individual case, a local educational agency is unable or unwilling to provide eligible students with a free appropriate public education as mandated by the EAHCA. Finally, the court enjoined the state either to promulgate a policy or set of regulations on the disciplining of handicapped students, or to establish a system of monitoring to ensure local compliance with federal requirements. *See* C.R. item 304, *reprinted in* Appendix B. *infra*.

Upon plaintiff's request, the district court agreed to reconsider its earlier ruling regarding the state's Eleventh Amendment immunity from a damage action. After entertaining additional argument on the question, the court concluded that it did not have to reach the issue of immunity because the plaintiffs had "failed to make a showing that they [had] in fact suffered damages which could be the subject of an award by this court against [the state]." C.R. item 311. The court entered its order denying relief on May 24, 1984.

All the parties timely filed their appeals. The SFUSD challenges the district court's declaratory judgment and injunction of December 2, 1983. The state appeals from the declaratory judgment and injunction of April 23, 1984. Doe and Smith take their cross-appeal from the order of May 24, 1984.

## III.
## ANALYSIS OF THE APPLICABLE STATUTORY STRUCTURE

### A. Section 504

Section 504 of the Rehabilitation Act, to which our attention must first be directed, provides in relevant part that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1982). The plaintiffs referred to this general antidiscrimination provision in their complaints, and the district court cited it as justification for its injunctive relief and declaratory judgments. We must hold that the district court erred in doing so. As the Supreme Court stated in *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984):

> Even assuming that the reach of § 504 is coextensive with that of the EHA, there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of § 504.

*Id.*, 104 S.Ct. at 3473. The plaintiffs' claims are not cognizable under section 504. *See Alexopulos v. Riles*, 784 F.2d 1408, 1412 (9th Cir.1986). All references to section 504 should be stricken from the injunctions and the declarations of rights. The district court's judgments must stand or fall by reference to the EAHCA alone.

### B. The EAHCA

As *Smith v. Robinson* indicates, Congress enacted the EAHCA in order to help remedy the inadequacy of the educational services provided to the nation's handicapped children. *See* 104 S.Ct. at 3468-69; 20 U.S.C. § 1400(b) (1982). The Act



provides states with substantial federal funding for use in special education, but conditions receipt of such monies on each state's compliance with numerous specific federal requirements. Foremost among these is the requirement that a state have in effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412 (1982). According to the Act, a "free appropriate public education" is

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with [an] individualized education program.

*Id.*, § 1401(18).

As the Supreme Court has stated, the individualized educational program—or "IEP"—is the EAHCA's modus operandi, *Burlington School Committee v. Department of Education*, ___ U.S. ___, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). An IEP is a written program of educational goals and services, tailored to meet the child's unique needs, that is developed at an IEP meeting according to the proper procedures. *See Board of Eduction v. Rowley*, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 3037-38, 73 L.Ed.2d 690 (1982); 20 U.S.C. § 1401(19); *id.* § 1415 (1982); 34 C.F.R. §§ 300.340-.349 (1985). The special eduction provided the child must comport with his or her IEP, *Rowley*, 458 U.S. at 203, 102 S.Ct. at 3049, and no such services may be provided until an IEP is "in effect." 34 C.F.R. § 300.342(b)(1) (1985).

In addition to the requirement of an IEP, the EAHCA and its implementing regulations establish a number of procedural safeguards for the benefit of parents. *See* 20 U.S.C. § 1415 (1982); 34 C.F.R. §§ 300.501-.589 (1985). These include the right to written notice whenever the agency proposes (or refuses) to initiate change in a child's educational program or placement, *see* 20 U.S.C. § 1415(b)(1)(C) (1982), the right to present complaints and receive an impartial due process hearing on any matter

relating to the provision of a free appropriate public education, *see id.* § 1415(b)(1)(E)-(b)(2), the right to bring an action in state or federal district court to challenge any final decision of a state educational agency on such a matter, *see id.* § 1415(e)(2), and the right to insist that their child "remain in [his or her] then current educational placement" during the pendency of review proceedings. *id.* § 1415(e)(3). These procedures ensure parental involvement in the administrative process and enable parents to challenge agency action that they regard as inappropriate or inadequate. *See Burlington School Committee*, 105 S.Ct. at 2002. It is out of the clash between these rights and those traditionally accorded public school officials that this case arises.

## IV.

## DISTRICT COURT RULINGS REGARDING DISCIPLINARY MATTERS

The defendants object to substantial portions of the district court's detailed rulings regarding disciplinary measures. Their general complaint is that the district court's commands exceed the reach of the EAHCA. In the interest of clarity, we summarize the challenged propositions as follows:[7]

(1) Handicapped children may not be expelled or excluded from school for any misbehavior that is a manifestation of their handicaps.[8]

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[7] Since the district court entered its judgments, the California legislature has amended and recodified the portion of the Education Code dealing with student discipline. Although we do not think that the actions of the California legislature have rendered the district court's judgments moot, these actions do make it difficult to relate the district court's pronouncements to the present case. *See, e.g., supra* note 6. For the sake of clarity, therefore, we shall henceforth describe and assess the district court's pronouncements on the Education Code provisions as if the court were addressing its remarks to the provisions of the current code. No substantive consequences will flow from this practice.

[8] The district court usually used the term "conduct that is a manifestation of the child's handicap" to describe the kind of student misbehavior that has a "protected" status under the EAHCA. To avoid awkward



(2) Under no circumstances may handicapped children be subjected to a *total* cessation of educational services, even for misbehavior that is not handicap-related.

(3) The California Education Code provisions describing the grounds and procedures for the expulsion of regular education students are invalid under the EAHCA as applied to handicapped students.

(4) California Education Code § 48212, which allows the governing board of a school to "exclude from attendance on regular school classes any child whose physical or mental disability is such as to cause his attendance to be inimical to the welfare of other pupils," is invalid under the EAHCA.

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circumlocutions or monotony in this opinion, we have sometimes used other terms such as "conduct that arises from the handicap," "conduct that is caused by the handicap," and "handicap-related misconduct." As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls. Although this definition may, depending on the circumstances, include the conduct of handicapped children who possess the raw capacity to conform their behavior to prescribed standards, it does not embrace conduct that bears only an attenuated relationship to the child's handicap. An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain the attention, or win the approval, of his peers. Although such a scenario may be common among handicapped children it is no less common among children suffering from low self-esteem for other, equally tragic reasons.

We note that recently enacted section 48915.5 of the California Education Code exempts from expulsion children whose conduct is "caused by" or is a "direct manifestation" of the child's handicap. Cal.Educ.Code § 48915.5(a)(2), (f) (Deering Supp.1986). We also observe that the section directs the IEP team, in making that determination, to review "the ability of the pupil to conform his or her behavior to prescribed standards," *id.* § 48915.5(e)(2). Because the state had not had occasion to apply these standards and the California courts have not construed them, we need not consider their validity here.

(5) Handicapped children may not be suspended pursuant to California Education Code § 48911(g)—which provides for extended suspension pending the resolution of expulsion proceedings—for behavior that is a manifestation of their handicaps.

(6) Handicapped children may not have their educational program reduced, or be subjected to any other disciplinary procedures aside from suspensions authorized by California Education Code § 48910 (two-day suspension authorized by a teacher) or § 48911 (five-day suspension authorized by a school principal, a principal's designee, or the superintendent of schools), for any behavior or misconduct that is a manifestation of their handicaps.

(7) School districts may not ignore the EAHCA's "stay put" provision, 20, U.S.C. § 1415(e)(3) (1982), which provides that handicapped children are to remain in their current placements (unless the parents otherwise agree) pending the resolution of EAHCA-related review proceedings.

We shall address each of these propositions.

A. Expulsion for Handicap-related Misbehavior

We agree that the EAHCA prohibits the expulsion of a handicapped student for misbehavior that is a manifestation of his handicap. This proscription, although nowhere directly stated in the EAHCA, may be inferred from the Act's history, purpose, terms, and accompanying regulations. *See Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir.1982); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir.) (Unit B), *cert. denied*, 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981); *Doe v. Koger*, 480 F.Supp. 225, 228 (N.D.Ind.1979).

The EAHCA was enacted in response to Congress's recognition that countless handicapped children were being denied a meaningful public education simply because states lacked the funds and the initiative to cope with the special problems involved in teaching those children. *See* 20 U.S.C. § 1400(b) (1982). Consequently, Congress endeavored to supply each state with the necessary funding, so long as each agreed to promulgate a policy "that assures *all* handicapped children the right to a free appropriate public education." *Id.* § 1412(1) (emphasis added). An



"appropriate" public education is provided by a program that is "specially designed . . . to meet the unique needs" of a handicapped child. *Id.* § 1401(19). It follows, we believe, that a handicapped child's unique needs and his corresponding handicap-related problems cannot form the basis for denying the educational services that the EAHCA was designed to foster.

This conclusion presents a problem in the case of an emotionally disturbed child's aggressive and disruptive behavior. Disruptive behavior is not a monopoly of the emotionally disturbed. For these children, however, such behavior may be the direct result of the handicap—and thus may be no different in principle from the physical incapacities of an orthopedically impaired child or the cognitive difficulties of a dyslexic student. We cannot say this is not possible. Congress, having included seriously emotionally disturbed children within the EAHCA's definition of handicapped children, *see id.* § 1401(1), must have intended that their handicap-related misbehavior should not be a cause for a cessation of educational services.

B. Expulsion and Exclusion in Other Cases

We do not hold, however, that a school district may never withhold educational services from a handicapped child. If the child's misbehavior is properly determined *not* to be a manifestation of his handicap,[9] the handicapped child can be expelled. *See Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir.1982); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir.) (Unit B), *cert. denied*, 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981); *Doe v. Koger*, 480 F.Supp. 225, 228 (N.D.Ind.1979). This conclusion does not conflict with the EAHCA. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all

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[9] A "proper determination" is one that is arrived at by an IEP team according to the correct procedures, *see* discussion infra, or, if applicable, by a hearing officer or court on review.

acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.

C. The California Education Code Provisions on Expulsion of Regular Education Students

It follows that the district court was correct in holding that the California Education Code provisions relating to the expulsion of regular education students are invalid under the EAHCA as applied to handicapped pupils. The provisions enumerating the substantive grounds for expulsion, *see* Cal.Educ.Code §§ 48900, 48915 (Deering Supp.1986), are defective because they fail to make exceptions for students whose misconduct is handicap-related. *See* discussion *supra*.

Moreover, the procedures for securing an expulsion are invalid. Expulsion constitutes a "change in placement" within the meaning of the EAHCA. *See Kaelin*, 682 F.2d at 598-602; *S-1*, 635 F.2d at 348. Consequently, school officials seeking to expel a handicapped student must follow the procedures prescribed in the Act and its accompanying regulations for changing a handicapped student's placement. these procedures include (1) notifying the parents in writing of the educational agency's intention to seek expulsion, *see* 20 U.S.C. § 1415(b)(1)(C)(i) (1982); (2) convening an IEP team meeting to assess the reason for the misconduct and the appropriateness of the child's current educational placement, *see id.* § 1401(18); 34 C.F.R. §§ 300.-342-.343 (1985); (3) conducting an independent evaluation of the pupil's educational needs (because expulsion constitutes a *significant* change in placement), *see* 20 U.S.C. § 1415(b)(1)(A) (1982); 34 C.F.R. § 104.35 (1985); (4) informing the parents of their right to demand both impartial administrative review of any IEP team decisions and judicial review of the state's final administrative determination, *see* 20 U.S.C. § 1415(b)(1)(D) (1982); and (5) allowing the child to remain in his then current educational placement pending resolution of any previously mentioned review proceedings, unless the parents otherwise agree, *see id.* § 1415(e)(3). Because the expulsion procedures for regular education students do not impose these special requirements, they are inapplicable to handicapped children.



Our analysis to this point assumes the ability to distinguish between handicap-related and handicap-unrelated behavior by means of the processes and safeguards applicable to handicapped students under the EAHCA. This is an assumption that Congress requires us to make. Although we have no doubt that the distinction exists, we recognize readily the difficulty in distinguishing between the two types of behavior in practice. Still, by receiving federal funds a state assumes that burden: those who accept the sovereign's pay cannot complain of his terms of acceptance.

D. California Education Code § 48212

The defendants seek to refute our conclusions by invoking California Education Code § 48212, which provides that "[t]he governing board of the school may exclude from attendance on regular school classes any child whose physical or mental disability is such as to cause his attendance to be inimical to the welfare of other pupils." Cal.Educ.Code § 48212 (Deering 1978). Defendants argue that this statutory provision does not violate the EAHCA and that the district court erred in declaring otherwise.

First, they contend that section 48212 can be harmonized with federal standards by construing it to refer only to disabilities that are not covered by the EAHCA. But what disabilities are those? The definition of "handicap" for the purposes of the EAHCA, *see* 20 U.S.C. § 1401(1) (Supp. I 1983); *supra* note 2, is nothing if not comprehensive. A section 48212 that refers only to those disabilities not protected by the EAHCA would be a section irrelevant for the purposes of this case. We reject this construction.

Defendants also suggest that the statutory term "disability" might be interpreted to cover only contagious diseases, and that the exclusion of children afflicted with such diseases would not violate the EAHCA. Our difficulty with this argument is twofold. First, such a narrow construction of the term "disability" is plainly contrary to common usage. Second, possession of a contagious disease is a specifically enumerated ground for exclusion under a separate statutory provision, *see* Cal.Educ.Code § 48211 (Deering 1978). We think it unlikely that the legislature would

have restated ambiguously an authorization it had elsewhere made explicit.

Defendants argue finally that the child's exclusion from *regular school* classes under section 48212 does not necessarily mean that he will be excluded from receiving an "appropriate public education." We acknowledge that the EAHCA does not compel localities to place handicapped students in regular education classes, but only in the least restrictive setting consistent with their needs and those of other students. *See* 20 U.S.C. § 1412(5)(B) (1982); 34 C.F.R. § 300.552 comment (1985) (quoting 34 C.F.R. Part 104, app. A, at ¶ 24 (1985)). Nonetheless, section 48212 is fatally defective on procedural grounds. Like expulsion, "exclusion" from regular school classes constitutes a "change in placement" that triggers the EAHCA's procedural requirements and safeguards, *see* 20 U.S.C. § 1415 (1982)—including the necessity to make placement decisions through the vehicle of the IEP team, *see id.* § 1401(19); § 1412(5)(B); 34 C.F.R. §§ 300.340-.346 (1985). Section 48212 ignores these strictures. But it is precisely these strictures that are binding on school officials. Section 48212 cannot relieve them of this burden.

E. Suspension Pursuant to Expulsion Proceedings

The school authorities in this case appear to have relied on California Education Code § 48911(g), which authorizes school district superintendents or their designees, under certain circumstances,[10] to extend a student's suspension indefinitely pending resolution of expulsion proceedings against him. The defendants apparently concede that the district court was justified in finding this provision invalid as applied to Doe and Smith. Neither could have been expelled for their admittedly handicap-related misconduct; nor, as a consequence, could they lawfully have been

[10] An extension of suspension may be granted "only if the superintendent or the superintendent's designee has determined, following a meeting in which the pupil and the pupil's parent or guardian are invited to participate, that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the educational process." Cal.Educ.Code § 48911(g) (Deering Supp.1986).



suspended in conjunction with expulsion proceedings. The defendants argue, however, that the provision is not necessarily invalid in all cases involving handicapped students.

We agree. Once an IEP team (or a hearing officer or court if review is sought) has properly determined that the misconduct at issue was not handicap-related, a handicapped child is subject to suspension during the pendency of any ensuing expulsion proceedings. Section 48911(g) does not, however, obviate the duty to make such a preliminary determination.

F. Other Disciplinary Measures

In what are the most troublesome portions of its two judgments, the district court ruled that handicapped children may not have their programs reduced, or be subjected to any other disciplinary measures save the two- and five-day suspensions authorized by sections 48910 and 48911 of the California Education Code, for conduct that is a manifestation of their handicaps. We believe this statement of law is overly broad.

A brief review of the principles we have recognized will be useful at this point. Under the EAHCA: (1) handicapped children may not be deprived of a free appropriate public education as a result of handicap-related misconduct, and (2) changes in a handicapped child's placement may be effected only through the EAHCA's unique procedural mechanisms. These principles do not immunize handicapped children from all discipline. School officials dealing with misbehaving handicapped children may freely employ reasonable disciplinary measures that neither work a deprivation of an appropriate public education nor are substantial enough to constitute "changes in placement" within the meaning of the Act.

The two- and five-day suspensions approved by the district court clearly meet both these criteria and are therefore valid. But such suspensions do not exhaust the types of disciplinary measures that are permissible. Informal and reasonable disciplinary measures that are less substantial—the sort that teachers and principals have traditionally used to maintain order in the classroom—are similarly inoffensive under the EAHCA.

When one ventures beyond these informal measures and the two- and five-day suspensions the district court approved, the path becomes dim and indistinct. At the time the district court's judgment was entered, California had no statutes authorizing suspensions of fixed duration in excess of five days. The district court obviously was justified in forbidding school officials from effecting ad hoc, unauthorized suspensions for longer periods. Recently, the California legislature added section 48912 to the Education Code. That provision empowers the governing board of a school district to suspend a student for as many as twenty, and in special cases thirty,[11] consecutive days during a school year. *See* Cal.Educ.Code §§ 48912, 48903 (Deering Supp.1986). The district court's decree obviously does not address the validity of such suspensions.

Perhaps we should ignore the issue. There are occasions, however, when a bit of dicta, if dicta it be in this case, can conserve time and money. We believe this is such an occasion. The EAHCA provides no bright-line criteria for determining when a disciplinary measure becomes a change in placement. The question is one of degree and requires an exercise of sound judgment. We do not think that the suspension authorized by Code section 48912 amounts to either a change in placement or the deprivation of an appropriate public education. Therefore, we believe it to be valid. Several factors influence our decision. First, section 48912 establishes a "normal" procedure that does not single out handicapped students for adverse treatment. *See* 34 C.F.R. § 300.513 comment (1985) ("While the placement may not be changed [absent EAHCA procedures], this does not preclude the agency from using its *normal* procedures for dealing with children who are endangering themselves or others." (emphasis added)). Second, the suspension period is fixed and temporary. Third, it gives school officials some needed breathing space for developing strategies to cope with the child during the pendency of any ensuing review proceedings.

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[11] If, "for purposes of adjustment, a pupil enrolls in or is transferred to another regular school, an opportunity school class, or a continuation education school or class" the period of suspension may extend to 30 days. *Id.* § 48903.



In reaching this determination, we do not denigrate the value of a month's worth of school days. As the Supreme Court has recognized, the loss of even ten school days is a significant enough deprivation to necessitate procedural due process protections. *See Goss v. Lopez*, 419 U.S. 565, 572-76, 95 S.Ct. 729, 735-37, 42 L.Ed.2d 725 (1975). Serious though it may be, however, such a deprivation is not, in our view, so substantial as to constitute a "change in placement" or a loss of a "free appropriate public education" within the meaning of the EAHCA.

G. The "Stay-Put Provision

The EAHCA's "stay put" provision, 20 U.S.C. § 1415(e)(3) (1982), provides that "[d]uring the pendency of any [review proceedings under the EAHCA], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child." Relying on this provision, the district court enjoined the defendants from "denying handicapped pupils their right to remain in their current placement pending resolution of the issues [relating to the cause of a handicapped student's misconduct] and of any proceedings relating to placement and provision of a free appropriate public education, unless the parents or guardian and the [local educational agency] otherwise agree." C.R. item 272 (Judgment Against the SFUSD); *accord* C.R. item 304 (Judgment Against the State). Defendants argue that this part of the judgment—which in fact closely tracks the language of 20 U.S.C. § 1415(e)(3) just quoted—is in conflict with a school's uncontested power to suspend even a handicapped pupil for up to five days.

As should be clear, we believe this conflict does not exist. Five-day suspensions of handicapped pupils are unobjectionable under the EAHCA precisely because such suspensions do not rise to the level of changes in placement within the meaning of the Act. It follows that such suspensions do not conflict with the "stay put" provision of 20 U.S.C. § 1415(e)(3) or the district court's command that the defendants obey that provision. Nor do the suspensions authorized under section 48912 of the Education Code contravene the "stay put" command.

The recently enacted California Education Code section 48915.5(g) poses more complicated questions, however. Subsection (g) is part of a provision labeled "Expulsion of pupil with previously identified exceptional needs" that addresses many of the issues raised in this case. Subsection (g) provides in pertinent part that "[i]n the event that a parent demands a hearing [to challenge an IEP team decision relating to a handicapped student's misconduct], all time requirements prescribed in this article for suspension or expulsion shall be extended to include the time necessary to conclude the review or appeal of any assessment or determination." Cal.Educ.Code § 48915.5(g) (Deering Supp.1986).

This provision is in conflict with federal law. Defendants contend that it does not so conflict and cite as authority *Jackson v. Franklin County School Board*, 765 F.2d 535 (5th Cir.1985). *Jackson* involved a 17-year old learning disabled student who had been removed from his placement and committed to a psychiatric hospital after unbuttoning the blouse of a female special education student and touching her breasts. Upon his release from the hospital and pending the development and approval of a revised IEP, Jackson sought readmission to his former educational placement. School officials denied his request, and their decision was ultimately approved by the Fifth Circuit. The court held that, notwithstanding 20 U.S.C. § 1415(e)(2), "schools have discretion to alter a handicapped student's placement when he endangers himself or others and threatens to disrupt a safe school environment." *Jackson*, 765 F.2d at 538; *accord Victoria L. by Carol A. v. District School Board*, 741 F.2d 369, 374 (11th Cir.1984). The *Jackson* court's decision relied heavily on an earlier Fifth Circuit case, *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.) (Unit B), *cert. denied*, 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981). In *S-1*, the court observed that "nothing in the [EAHCA], the regulations, or the legislative history suggests that Congress intended to remove from local school boards—who alone are accountable to the entire school community—their long-recognized authority and responsibility to ensure a safe school environment." *Id.* at 348 n. 9.



Although we are sympathetic to the concerns voiced by the Fifth Circuit in *Jackson*, section 1415(e)(3) does not list any exceptions to its automatic injunction. Moreover, the comment to 34 C.F.R. § 300.513 (1985) observes that, "[w]hile the placement may not be changed [absent EAHCA procedures], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." This passage recognizes the residual authority of school officials referred to in *S-1*, but it also indicates that such authority extends only to actions that fall short of "changes in placement."

Needless to say, this line—between residual disciplinary authority on the one hand and a "change in placement" on the other—is a difficult one to draw. We believe, however, that a palpable difference exists between a provision authorizing a fixed term suspension and one that confers the power on school officials to suspend a student's education for an indefinite period of time. The first fixes a "deadline" for the student's return to school, and thus creates a special impetus to resolve any dispute arising from disciplinary concerns; the second does not. We do not believe that Congress meant to allow school officials to avoid the EAHCA's "stay-put" provision simply by making a unilateral determination that a child should be suspended indefinitely because he or she threatens to disrupt the educational process. This limitation does not leave educators helpless. They have recourse to the gamut of lesser disciplinary measures and program variations that do not rise to the level of changes in placement. Moreover, educational agencies in extraordinary circumstances may seek judicial relief should existing procedures prove inadequate to cope with truly exigent circumstances. In sum, we find section 48195.5(g) of the California Education Code valid only to the extent it does not conflict with express terms of 20 U.S.C. § 1415(e)(2) (1982).

## V.

## DISTRICT COURT RULINGS REGARDING PLACEMENT PROCEDURES

The defendants object to several pronouncements of the district court regarding the procedures that must be followed to change a

student's placement pursuant to EAHCA and its regulations. Once again, we summarize the propositions to which these objections are directed:

(1) Whenever the educational agency wishes to effect any significant change in the placement, program, or services of a handicapped child in response to misconduct arising out of that child's handicap, it must first conduct an evaluation of the pupil's needs in accordance with 34 C.F.R. § 104.35 (1985).

(2) Whenever the educational agency seeks to change a handicapped child's placement in response to his misconduct, an IEP team must meet within five days of any accompanying disciplinary action in order to consider the matter.

(3) When an IEP team convenes to determine whether a child's misconduct is handicap-related and whether his IEP, if any, is appropriate and is being properly implemented, team decisions are to be made according to majority rule.

A. Independent Educational Evaluations

1. The district court judgment

The defendants concede that 34 C.F.R. § 104.35 (1985) requires an educational agency to conduct an evaluation of a handicapped pupil's needs before taking any action with respect to any significant change in placement. But they argue that the district court's injunction goes too far in compelling educational agencies to conduct such evaluations before "recommending or effecting any significant change of . . . *program* or *services* for handicapped pupils as a result of behavior or conduct which was a manifestation of the pupil's [sic] handicaps." Injunction of the District Court Against the SFUSD ¶ 10 (Dec. 2, 1983) (emphasis added), *reprinted in* C.R. item 272.

An examination of 34 C.F.R. § 104.35 in its entirety reveals that the defendants' argument fails. The section provides in relevant part:

> A recipient . . . shall conduct an evaluation . . . of any person who, because of handicap, needs . . . special education or related services before taking any action with respect to



> the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

34 C.F.R. § 104.35(a) (1985). This language embraces *any significant change* in placement. We believe that such a change occurs when there is a significant change in program or services. Our interpretation is confirmed by 34 C.F.R. § 300.551 (1985), which provides:

> (a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.
>
> (b) The continuum required under paragraph (a) of this section must:
>
> • • •
>
> (2) Make provisions for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

Inasmuch as the regulations draw no stark distinctions between the terms placement, program, and services, we affirm this portion of the district court's judgment.

We do not hold, however, that every *minor* change in program or services is a change in placement triggering the EAHCA's procedural safeguards. The change must be *significant*. The line between changes in placement and certain fixed term disciplinary measures has already been identified. *See* discussion *supra*. Here we draw a similar line, *viz.* between *minor* and *significant* changes in program or services. We do so because we recognize that education is an art in which all who participate must be accorded some flexibility in their practices and relationships. The due process model of the criminal justice system should not be our guide in fashioning these practices and relationships.

2. California Education Code § 48915.5(e)

Despite the value we place on flexibility in the educational setting, we acknowledge that when a change in placement, pro-

gram, or services is significant, the flexibility countenanced by the EAHCA is diminished and strict procedures apply. This truth emerges from the plaintiffs' contention that newly enacted section 48915.5 of the California Education Code too narrowly construes the independent evaluation requirement. Subsection (e) of that provision directs IEP teams, in determining whether a handicapped pupil should be expelled, to consider "recent and relevant information regarding the pupil." Cal.Educ.Code § 48915.5(e) (Deering Supp.1986). "Recent information" is defined to mean "information that has been acquired within three years of the date of the alleged misconduct." *Id.* "Relevant information" includes the following:

> (1) A review of the pupil's school progress and behavior, if available, including, but not limited to, a review of the pupil's individualized educational program, teacher progress reports and comments, school health records, and school discipline records.
>
> (2) A review of the ability of the pupil to conform his or her behavior to the prescribed standards, and a determination of the relationship, if any, between the pupil's behavior and his or her handicapping condition.

*Id.* § 48915.5(e)(1)-(2).

Although this statutorily defined class of information is relevant to the IEP team's deliberations, we agree with the plaintiffs that it is conspicuously incomplete. As we indicated above, before an IEP team can recommend a handicapped student for expulsion proceedings, it *must* consider the results of an independent educational evaluation conducted in accordance with the guidelines of 34 C.F.R. § 104.35 (1985). To the extent that section 48915.5 of the California Education Code might be thought to direct otherwise, it is invalid.

B. Five-day Deadline

Defendants strongly complain about the ruling that an IEP team must convene within five days of an educational agency's decision to seek a handicapped pupil's expulsion for misconduct. The five-day deadline, they assert, is impractical, unreasonable,



and an economic hardship. They also argue that the requirement finds no support in the statute or regulations. Here the defendants are on solid ground.

Defendants correctly observe that an IEP team is unequipped to evaluate the source of a handicapped student's misconduct until it has obtained the results of a comprehensive evaluation conducted in accordance with 34 C.F.R. § 104.35 (1985). Such an evaluation can be generated in five days only in an unusual case. It would be pointless to require an IEP team to convene before the evaluation is at hand. Moreover, IEP teams consist of at least two school officials in addition to the parents, and may, at the parents' or agency's discretion, include other interested parties. *See* 20 U.S.C. § 1401(19) (1982); 34 C.F.R. § 300.344 (1985). It is unrealistic to assume that all these parties will be able to attend an IEP meeting on five days' notice. Furthermore, an inflexible five-day deadline serves no useful function. the "stay-put" provision, 20 U.S.C. § 1415(e)(3) (1982), provides schools with sufficient incentive to convene IEP teams swiftly when student misconduct creates problems.

Finally, nothing in the statute or regulations appears to warrant the five-day deadline. Applicable laws indicate only the following occasions when an IEP team must meet subsequent to an initial placement: (1) at least once a year to review the child's IEP, *see* 34 C.F.R. § 300.343(d) (1985); (2) within 30 days after a parent requests such a meeting, *see* Cal.Ed.Code § 56343.5 (Deering Supp.1986); and (3) whenever the local educational agency wishes to change the child's educational placement (no time limit specified), *see* 34 C.F.R. § 300.504 comment 1 (1985). The five-day deadline cannot be inferred from these provisions.

We recognize that the district court has broad discretion to fashion appropriate remedies for violations of the EAHCA. *See Burlington School Committee v. Department of Education*, ___ U.S. ___, 105 S.Ct. 1996, 2002-03, 85 L.Ed.2d 385 (1985); 20 U.S.C. § 1415(e)(2) (1982). Nonetheless, it has no authority to impose this five-day deadline.

C. Majority Rule

The defendants challenge vigorously the district court's ruling that when an IEP team convenes to review proposed changes in placement in response to misconduct, decisions shall be made by majority rule. They argue instead that such decisions are to be made be consensus. The parties raise a fundamental issue to which, surprisingly, there is no clear answer.

The majority-rule view draws no express support from any relevant authorities. Moreover, such a policy seems inconsistent with the liberal provisions for expansion of IEP team membership. The regulations, to illustrate, provide that either parents or the agency may, at their discretion, invite additional persons to attend IEP meetings. *See* 34 C.F.R. § 300.344 (1985). This eliminates a key prerequisite to utilization of the majority rule, *viz.* a body having a fixed and specific number of members during the pendency of the issue sought to be resolved. Majority rule with a floating membership would encourage both sides in an IEP dispute to attempt to "stack the deck" by inviting numerous additional participants who shared the same views. It is inconceivable to us that Congress intended such a result. Therefore, we reverse the district court's judgment regarding majority rule.

A question remains, however, as to what principle of decision-making should be employed. Decision by consensus has little utility with respect to issues whose intensely emotional nature makes reconciliation impossible. Perhaps the local educational agency has the power, after consulting consulting with other IEP team members, to resolve any IEP issue that arises after an initial placement.[12] In natural opposition to this position stands the

[12] Parental consent must be obtained prior to the "[i]nitial placement of a handicapped child in a program providing special education and related services," 34 C.F.R. § 300.504(b)(1) (1985), unless the educational agency obtains an override through the applicable administrative procedures, *see id.* § 300.504(c). After the initial placement, parental consent is not required "as a condition of any *benefit* to the parent or child." *Id.* § 300.504(b)(2) (emphasis added). Significantly, this consent provision does not address the conditions for imposing "detriments" on the parent or the child. Comment 1 to the provision states that "[a]ny changes in a child's special educational program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C." *Id.* § 300.504 comment 1. This elaboration is unhelpful in clarifying the parents' role with respect to changes in placement.



interests of the parents. Although the EAHCA clearly envisions an active participatory role for parents in the placement process, *see Burlington School Committee*, 105 S.Ct. at 2002; 20 U.S.C. § 1401(19) (1982); *id.* § 1412(7); *id.* § 1415(b)(1)(A), the Act nowhere explicitly vests them with a veto power over any proposal or determination advanced by the educational agency regarding a change in placement.

Despite its questionable utility for dealing with strongly contested issues, the consensus principle is supported by the EAHCA's implementing regulations and their accompanying comments. For example, Appendix C to Part 300 of 34 C.F.R. states that the purpose of an IEP meeting is to enable parents and school personnel, "as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be." 34 C.F.R. pt. 300, app. C, at 68 (1985). The Appendix later states that an IEP is "in effect" when, among other things, that IEP "is regarded *by both the parents and agency* as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided." *Id.* at 71 (emphasis added). Still later, in addressing the role of the parents at an IEP meeting, the Appendix explains that

> [t]he parents of a handicapped child are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child.

*Id.* at 77.

Finally, the regulations provide that *either* a parent or a public agency may initiate an impartial due process hearing pursuant to 20 U.S.C. § 1415(b)(1)(E)-(b)(2) (1982) if dissatisfied with the results of IEP team discussions or with other placement matters.

However, the Supreme Court's opinion in *Burlington School Committee v. Department of Education*, ___ U.S. ___, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), qualifies the "consensus" inference. In discussing parents' participatory role in developing IEPs for their children, the Court observed that Congress, "[a]pparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any dispute the school officials would have a natural advantage, . . . incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreement." *Id.*, 105 S.Ct. at 2002.

We construe the Court's language as a recognition that, although the formulation of an IEP is ideally to be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. If the parties reach a consensus, of course, The EAHCA is satisfied and the IEP goes into effect. If not, the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan.[13] *See* 20 U.S.C. § 1415(b)(2); 34 C.F.R. pt. 300, app. C, at 68 (1985)

[13] Our interpretation would seem to be confirmed by close attention to the actual provisions detailing procedural safeguards. For instance, section 1415(b)(1)(C) provides that the agency shall give parents

> written prior notice . . . whenever such agency or unit—
> (i) *proposes* to initiate or change, or
> (ii) *refuses* to initiate or change, the identification, evaluation, or education placement of the child or the provision of a free appropriate public education to the child.

20 U.S.C. § 1415(b)(1)(C) (1982) (emphasis added). Moreover, contrary to the regulations, the statute appears to grant only parents—and not the educational agency—the right to petition for an



(discussing individualized educational programs). Similarly, the parents have a right to a due process hearing should they believe that the IEP drafted by the local agency conflicts with the consensus reached at the meeting. Any party aggrieved by the findings and decisions made during such due process hearings may seek judicial review under 20 U.S.C. § 1415(e)(2).

We emphasize that parents may seek review of any decision they dislike and that, during the pendency of any such review proceedings, the child will remain in his or her current placement if the parents so desire. *See* dicussion *supra*.

## VI

## THE DISTRICT COURT RULINGS REGARDING THE REDUCTION OF SMITH'S SCHEDULE

### A. Exhaustion of Administrative Remedies

The SFUSD claims that Smith did not exhaust his administrative remedies in challenging the reduction in his schedule from a full- to a half-day program. SFUSD then asserts that the district court for that reason should have refused to consider that challenge. We disagree.

Most courts, it is true, have recognized that a plaintiff must exhaust his administrative remedies under the EAHCA before he can maintain a suit in federal court, *Timms v. Metropolitan School District*, 722 F.2d 1310, 1316-17 (7th Cir.1983); *see, e.g. Riley v. Ambach*, 668 F.2d 635, 640 (2d Cir.1981). Nonetheless, courts will not enforce this general rule in cases where administrative relief would be futile or inadequate. *See Wilson v. Marana Unified School District No. 6*, 735 F.2d 1178, 1181 (9th Cir.1984); *Monahan v. Nebraska*, 645 F.2d 592, 597 (8th Cir.1981).

The SFUSD maintains that this exception is not available to Smith because he neither alleged in his complaint, nor offered

administrative due process hearing. *See id.* § 1415(a); *id* § 1415(b)(1)(E).

proof, that administrative review would have been futile or inadequate. SFUSD's conduct in this case justified the excusing of Smith's failure. Although the SFUSD now concedes that the reduction in Smith's schedule was a "change in program" subject to the procedural safeguards (including administrative review) detailed in 20 U.S.C. § 1415 (1982), school officials did not initially so characterize it. The SFUSD completely failed to perform its statutory duty to notify Smith's grandparents of the change in a manner that would fully inform them of all available safeguards and avenues of review, *see* 20 U.S.C. § 1415(b)(1)(D) (1982).

Under these circumstances, we will not penalize an aggrieved party. As the court stated in *Christopher T. v. San Francisco Unified School District,* 553 F.Supp. 1107 (N.D.Cal.1982):

> The evaluation procedures under [the EAHCA], and the safeguards available in connection with those procedures, were intended to protect parents and children whom the responsible local agency has treated unfairly; they were not intended . . . to insulate the agency from federal court review of its conduct.

*Id.* at 1117.

B. The Merits

Turning to the merits, the issue is whether the district court erred in ruling that the SFUSD violated appellee Smith's rights when it reduced his full-day schedule to a part-day schedule without first convening an IEP team meeting. Smith's IEP, the SFUSD argues, was specifically designed to be flexible enough to accommodate a reduction in program under the circumstances of this case. *See* discussion of facts, *supra.* If this be true, the reduction did not violate the EAHCA's procedural dictates. Smith, on the other hand, argues that the reduction was a partial expulsion because it was implemented in furtherance of disciplinary goals. Such an expulsion would constitute a violation of the EAHCA.

We reject the "partial expulsion" characterization. Proper conduct and education are inextricably intertwined. Misconduct is



a signal that a child's current placement is inappropriate. As a comment to the regulations observes, "where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment." 34 C.F.R. § 300.552 comment 1 (1985). Thus, a reduction in program, even when based upon misconduct arising from a child's handicap, is not necessarily violative of the EAHCA. Such a reduction is valid in principle if it is contemplated by the child's IEP and tied to valid educational goals.

Nonetheless, we do not approve the manner in which the SFUSD reduced Smith's schedule in this case. The SFUSD has conceded that the reduction, even if contemplated by Smith's IEP, constituted a change in placement subject to some EAHCA safeguards. By implementing the reduction without formally notifying Smith's grandparents of their right to protest and secure review, SFUSD violated Smith's rights.

We recognize that there is a need for some flexibility in IEPs, but we also recognize legitimate flexibility cannot be a tool for circumventing the EAHCA's protections. Before the school may effect a reduction in schedule or any other change in placement contemplated by the IEP, it must notify the child's parents of their right to review and otherwise afford them the safeguards to which they are entitled. The operative concept here is "change in placement."

## VII.

## DISTRICT COURT RULINGS AFFECTING THE DUTIES OF THE STATE EDUCATIONAL AGENCY

A. Duty To Provide Services Directly

The state contends that the district court erred in enjoining it to provide services directly whenever, in any individual case, it determines that a local educational agency is unable or unwilling to maintain programs of free appropriate public education for handicapped students. According to the state, section 1414(d) of the EAHCA requires it to provide services directly, not in

individual instances of local inaction, but only when localities maintain no programs of special education whatsoever.

We think the state conceives its role under section 1414(d) too narrowly. When read in its entirety, the provision imposes on the state a broader duty. Although the state stresses the language in 20 U.S.C. § 1414(d)(1) (1982) that speaks of the state's responsibility for direct action when the locality fails to maintain "programs" of free appropriate education, section 1414(d)(3) specifically requires direct action when a local education agency "has *one or more* handicapped children who can best be served by a regional or State center designed to meet the needs of such children." *Id.* § 1414(d)(3) (emphasis added). It would seem incontrovertable that, whenever the local agency refuses or wrongfully neglects to provide a handicapped child with a free appropriate education, that child "can best be served" on the regional or state level. *See also Kruelle v. New Castle County School District*, 642 F.2d 687, 696-99 (3d Cir.1981) (holding that the district court did not err in assigning to the state board of education the responsibility of providing a child with an appropriate public education); *Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp.1263 (N.D.Ga.1981)(holding that 20 U.S.C. § 1414(d) places the responsibility on the state educational agency either to make sure that local agencies provide adequate educational services to handicapped children, or to provide directly such services themselves), *aff'd*, 716 F.2d 1565 (11th Cir.1983), *vacated on other grounds*, ____ U.S. ____, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1984); *cf. S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir.) (Unit B) (holding that a state agency can be enjoined to intervene directly in a local expulsion proceeding), *cert. denied*, 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981).

Although the state has broad responsibilities under the EAHCA, they are not absolute. It is not obliged to intervene directly in an individual case whenever the local agency falls short of its responsibilities in some small regard. The breach must be significant (as in this case), the child's parents or guardian must give the responsible state officials adequate notice of the local



agency's noncompliance, and the state must be afforded a reasonable opportunity to compel local compliance.

B. Duty To Promulgate a Policy or Institute Monitoring Procedures

1. The district court judgment

The state also takes issue with the portion of the district court's judgment enjoining the state either to draft a policy on the disciplining of handicapped students that complies with the EAHCA or to develop a procedure for monitoring the compliance of local educational agencies. The state defendants contend that the EAHCA does not require them to promulgate such a policy, that they voluntarily submitted a policy to the district court before it issued its judgment, and that the state has at all relevant times had a federally approved monitoring plan.

We do not find any of these arguments persuasive. The EAHCA expressly provides that, in order to qualify for federal assistance, a state must have in effect "a policy that assures all handicapped children the right to a free appropriate public education." *See* 20 U.S.C. § 1412(1) (1982). The district court concluded that the state's disciplinary procedures for regular education students were not adequate to protect the rights of handicapped students under the EAHCA, and that this gap in state policy contributed to the violation of the plaintiffs' rights by the SFUSD. We agree. We also think that the policy later submitted to the district court by the state was completely inadequate in light of the standards we enunciate today. Finally, the state's monitoring procedure was demonstrably insufficient to protect the rights of handicapped students such as Smith and Doe. In this regard, it is immaterial the the executive branch approved the state's overall plan for handicapped children. The EAHCA empowers a reviewing court to decide independently whether state and local procedures satisfy federal requirements. *See* 20 U.S.C. § 1415(e)(2) (1982). When it finds a violation, a court may grant "such relief as [it] determines is appropriate." *Id.* We believe the district court acted well within its scope of discretion in fashioning the remedy it did.

2. The new state legislation

As previously discussed, the state recently enacted legislation dealing with the disciplining of handicapped children. *See* Cal. Educ. Code § 48915.5 (Deering Supp.1986). This legislation takes significant strides toward satisfying the terms of the district court's injunction and bringing state law into compliance with the EAHCA. As we held earlier, however, sections 48915.5(e) and 48915.5(g) of the new law are violative of the EAHCA and its regulations. The state must revise these provisions in accordance with the relevant principles of this opinion.

## VIII.

## DISPOSITION OF PLAINTIFFS' DAMAGE CLAIMS

Doe and Smith challenge on cross-appeal the district court's dismissal of their damage claims. These claims fall into four categories. (1) EAHCA claims against the state; (2) section 504 claims against the state; (3) section 1983 claims against the state; and (4) section 504, section 1983, and EAHCA claims against ex-Superintendent Wilson Riles in his individual capacity.

A. EAHCA Claims Against the State

The plaintiffs argue that the district court dismissed their EAHCA damage claims against the state based on an erroneous standard by which to measure a valid claim under the statute. We do not reach this issue because, whatever the proper standard, we hold that the state is shielded by the Eleventh Amendment from damage liability under the EAHCA.

Doe and Smith cite two Ninth Circuit cases, *Students of California School for the Blind v. Honig*, 736 F.2d 538 (9th Cir. 1984), *vacated on other grounds*, ____ U.S. ____, 105, S.Ct. 1820, 85 L.Ed.2d 114 (1985) (per curiam) and *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir.1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985), for the proposition that the State of California has waived its sovereign immunity with regard to the EAHCA. Although these cases formerly were controlling, they can carry no force in light of



the Supreme Court's recent decision in *Atascadero State Hospital v. Scanlon*, ____ U.S. ____, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). In *Scanlon*, the Court held that the State of California is immune from suits for monetary relief under § 504 of the Rehabilitation Act. We believe the Court's reasoning compels a similar result with respect to the EAHCA.

The Court began in *Scanlon* by determining that California had not waived its general immunity to suit in federal court. Although Art. III, § 5 of the California Constitution provides that "[s]uits may be brought against the State in such manner and in such courts as shall be directed by law," the Court held that this language did not satisfy the stringent test necessary for waiver under the Eleventh Amendment. *See id.*, 105 S.Ct. at 3147. "[F]or a State statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity," the Court explained, "it must specify the State's intention to subject itself to suit in *federal court*." *Id.* The California Constitution did not so specify.

The Court next determined that Congress had not abrogated the state's immunity in enacting the Rehabilitation Act. *See id.* Acknowledging Congress's power to abrogate sovereign immunity pursuant to section 5 of the Fourteenth Amendment, the Court cautioned that congressional exercise of that power should be inferred only when such an intention is expressed "in unmistakable language in the statute itself" *Id.* at 3148. In the Court's estimation, the language in the Rehabilitation Act providing remedies for violations of section 504 did not meet this test. *See id.* at 3149.

Finally, the Court held that California had not tacitly consented to suit in federal court merely because "various provisions of the Rehabilitation Act are addressed to the States" and because California "participat[ed] in programs funded under the statute." *Id.* at 3150. The Act's language, the Court concluded, "falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Id.*

*Scanlon* thus enunciated a three-step test for resolving sovereign immunity questions that we must apply: (1) Has the state

expressly waived its general immunity to suit in federal court? (2) Has Congress expressed in unmistakable language its intent to abrogate states' sovereign immunity pursuant to section 5 of the Fourteenth Amendment? and (3) Does the act manifest a clear intent to condition a state's receipt of federal benefits on the state's waiver of its constitutional immunity? Applying each step of this test to EAHCA, we conclude that California retains its sovereign immunity from damage suits.

First, California has not waived its general immunity to suit in federal court. *See Scanlon*, 105 S.Ct. at 3147. Second, Congress did not unequivocally express in the Act its intent to abrogate California's sovereign immunity. The EAHCA provision authorizing suits in federal courts provides in relevant part:

> Any party aggrieved by the findings and decision made under subsection (b) [providing for administrative review] ... shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

20 U.S.C. § 1415(e)(2). This language simply does not pass muster under the stringent *Scanlon* test. Third, although the EAHCA—like the Rehabilitation Act—imposes various duties on the states, it nowhere explicitly conditions their right to receive funds on their willingness to waive their sovereign immunity.

Thus, we affirm the district court's dismissal of the plaintiffs' damage claims under the EAHCA.

B. Section 504 Claims Against the State

*Scanlon*, along with our earlier holding that the EAHCA provides the sole remedy for handicapped children who have been denied their right to a free appropriate public education, *see Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 3473, 82 L.Ed.2d 746 (1984); *Alexopulos v. Riles*, 784 F.2d 1408, 1411-12 (9th Cir.1986), dispose of plaintiffs' damage claims against the state under section 504.



C. Section 1983 Claims Against the State

Doe and Smith fare no better in seeking to employ section 1983 to impose liability in damages against the state. Such claims are barred by the Eleventh Amendment. *See Edelman v. Jordan*, 415 U.S. 651, 677, 94 S.Ct. 1347, 1362, 39 L.Ed.2d 662 (1974).

D. Claims Against Former Superintendent Riles in his Individual Capacity

Doe and Smith's claims against Riles in his individual capacity present somewhat more complicated problems. In their complaints, they sued Riles for damages in both his official and individual capacities pursuant to the EAHCA, section 504, and section 1983. Riles eventually pleaded qualified immunity on the claims asserted against him individually. Soon thereafter, the plaintiffs requested further discovery against Riles. The district court promptly denied the request on two grounds: first, that the plaintiffs had failed to state a claim against Riles in his individual capacity; and, second, that the deposing of Riles "would add nothing to the claim against him in his official capacity" for declaratory and injunctive relief. Order Re Further Discovery and Proceedings Re Claims Against State Defendants at 1 (Oct. 26, 1983), *reprinted in* C.R. item 265. We agree with the plaintiffs that the denial of further discovery was tantamount to a sua sponte dismissal of their claims against Riles in his individual capacity because of their failure to state a claim upon which relief could be granted, *see* Fed.R.Civ.P. 12(b)(6)

The district court's action was grounded on the plaintiffs' implicit theory that Riles's liability stemmed from his failure to perform his official duties. The court observed that "the only plausible omission liability alleged in the complaint is defendant's failure to promulgate or implement regulations or policy." It concluded that because "nothing stated in the complaint ... suggests some conduct or omission by defendant giving rise to a common law cause of action," the plaintiffs had alleged only violations by Riles in his official capacity. *See* Order Re Further Discovery and Proceedings Re Claims Against State Defendants at 2 (citing *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345

(9th Cir. 1981), *aff'd*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983)), *reprinted in* C.R. item 265.

We sustain the district court's holding, but on somewhat more fully developed grounds. The claims based on section 504 were subject to dismissal for the reasons already discussed, *viz.* that the EAHCA supersedes section 504 in regard to claims alleging a denial of the right to a free appropriate public education. *See Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 3473, 82 L.Ed.2d 746 (1984); *Alexopulos v. Riles*, 784 F.2d 1408, 1411-12 (9th Cir.1986).

The remaining claims—EAHCA claims, section 1983 claims based upon the EAHCA, and section 1983 claims based upon the Fourteenth Amendment right to due process—are ones with respect to which Riles at all relevant times enjoyed a qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982). In *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), the Supreme Court clearly delineated the scope of this qualified immunity: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." *Id.*, 104 S.Ct. at 3021; *accord Fitzgerald*, 457 U.S. at 818, 102 S.Ct. at 2738.

We do not believe that Doe and Smith can make the required *Davis v. Scherer* showing.

1. Claims under the EAHCA and section 1983 through the EAHCA

As this case amply illustrates, at the time the actions against the plaintiffs took place, the effect of the EAHCA on school disciplinary matters was uncertain in this circuit. Similarly unclear were the specific duties of the responsible state agency in overseeing local agencies' compliance with the EAHCA. In the EAHCA Congress frequently spoke as an oracle, not as the author of detailed specifications. Under these circumstances, we cannot say that Riles's omissions violated clearly established rights of the plaintiffs under the EAHCA.



2. Independent constitutional violations

Plaintiffs are no more successful with respect to their independent due process claims. They argue that fundamental fairness compels states to afford handicapped children procedures more involved that those the Supreme Court prescribed for other students in *Goss v. Lopez*, 419 U.S. 565, 577-84, 95 S.Ct. 729, 738-41, 42 L.Ed.2d 725 (1975). Whatever the merits of this assertion, we do not think that any such constitutional right was clearly established at the time the plaintiffs' causes of action arose.

Therefore, we hold the plaintiffs' damage claims against Riles in his individual capacity are barred by his qualified immunity.

## IX.

## CONCLUSION

Our examination of the EAHCA and its regulations has left us with the firm conviction that federal law respecting the education rights of handicapped children is not a model of clarity. As we have indicated, the issues are exquisitely difficult. Their avoidance by Congress and administrators is understandable. Courts, however, must confront those questions fairly presented to them. The district court did thus and, although we do not agree with each of its holdings, we commend its effort.

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED IN PART.

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE, Plaintiff,

JACK SMITH, Plaintiff-Intervenor,

vs.

BILL MAHER, et al., Defendants.

Civil No. C-80-4270 MHP
JUDGMENT

This court, having granted by Order dated June 17, 1983, a partial summary judgment to the plaintiffs herein against the San Francisco Unified School District (hereinafter "SFUSD") and other associated defendants and subsequent to the granting of said motions, issued a "Declaration and Permanent Injunction" on October 24, 1983, against the SFUSD and associated defendants, does hereby grant judgment to plaintiff John Doe and plaintiff-intervenor, Jack Smith against the defendants SFUSD, William Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey, Superintendent Robert Alioto, Robert Figone, Henry Caruso, Marybeth Barrett, and their legal successors in office.

Plaintiffs are granted judgment in their favor as follows:

### MONETARY DAMAGES

By stipulation between the plaintiff, John Doe and his guardian ad litem, Pauline Gonzales, and the defendant, San Francisco Unified School District, judgment is hereby entered in the amount of $1,600.00

By stipulation between the plaintiff-intervenor, Jack Smith and his guardian ad litem, Quennie Izzo, and the defendant, San Francisco Unified School District, judgment is hereby entered in the amount of $1,600.00



### DECLARATION OF RIGHTS

Plaintiffs, as educationally handicapped children and residents of the City and County of San Francisco:

1. Have the right to the full benefits and protection of the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983, Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (formerly EAHCA), § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations promulgated thereto;

2. Have the right to a free and appropriate public education, as defined by the EAHCA, from defendant SFUSD;

3. Have the right to education in the least restrictive environment suitable to their individual needs and with non-handicapped children to the extent appropriate within the meaning of the EAHCA;

4. Shall not have their educational program reduced, or be expelled, excluded, or subjected to any other disciplinary procedures, with the exception of suspensions authorized by California Education Code §§ 48901 and 48903(a), for any behavior or misconduct which is a manifestation of their handicaps or which arises out of their handicaps;

5. Shall not be denied or totally expelled or excluded from having any educational services whatsoever provided by the SFUSD;

6. Have the right to have the determination of appropriate education, placement, and services for them made by a specialized multi-disciplinary "IEP" team, subject to review by an impartial hearing officer;

7. Have the right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, 34 C.F.R. §§ 300.340—.349 and 3000.500—.514 [sic];

8. Have the right to a written notice to their parents or guardians within a reasonable time before the SFUSD proposes to change their educational placement program or services or the provision of free appropriate public education to them, including

an explanation of all procedural safeguards available to the pupil and parents, a description of why the SFUSD proposes to take the action, and a description of all options the SFUSD considered and the reasons why those options were rejected;

9. The right to a comprehensive evaluation, as required by 34 C.F.R. § 104.35, before having any significant changes in educational placement or program recommended by the SFUSD;

10. Have the right, whenever a change of placement or educational program of [sic] service is rcommended [sic] as a result of their behavior or misconduct, to have a meeting of an Individualized Education Program team, pursuant to 34 C.F.R. § 300.340—300.349, convened within 5 schooldays to determine by a majority of the IEP team whether the behavior or misconduct was a manifestation of the pupil's handicap(s) and whether the pupil's current IEP, if any, is appropriate and is being correctly implemented;

11. Have the right to remain in their current placements pending the IEP team meeting or other proposal to change the educational placement of the child or the provision of a free and appropriate public education, and all administrative and judicial reviews of its determination, unless the parent or guardian and the SFUSD agree otherwise;

12. Have the right to be free from any further disciplinary action if the IEP team determines either that the behavior or misconduct is a manifestation of or arises from the handicapping condition, or, that the IEP is not appropriate or is not being implemented correctly.

The Court further declares that:

The use of any disciplinary procedures, with the exception of 5-day suspension authorized by California Education Code § 48903(a), against handicapped children for conduct or behavior arising out of their handicap(s) violates the EHA and § 504.

California Education Code § 48900 et seq. relating to expulsion, and any state or SFUSD administrative regulation or policy promulgated pursuant thereto applied to plaintiffs as handicapped students of the SFUSD, violates the EAHCA and § 504.



The application of California Education Code § 48903(h), and any other state statutes or regulations in aid of expulsion, exclusion, or extended suspension, violates plaintiffs' rights under the EAHCA and § 504.

California Education Code §§ 48212-48214, and any state or SFUSD administrative regulation or policy promulgated pursuant thereto which purports to authorize exclusion of students from the San Francisco Unified School District on the basis of physical or mental handicaps violate the EAHCA and § 504.

## PERMANENT INJUNCTION

The Court having thus determined that the SFUSD defendants violated these rights of the plaintiffs secured by the EAHCA, Section 504, and 42 U.S.C. § 1983, permanently enjoins the SFUSD, defendants, as follows:

1. Defendants are permanently enjoined from referring, recommending, or otherwise processing such handicapped pupils for expulsion, exclusion, or disciplinary procedures, with the exception of five-day suspension authorized by California Education Code § 48903(a), as a result of behavior or misconduct which is a manifestation of or arises out of a pupil's handicap(s).

2. Defendants are permanently enjoined from extending suspensions of handicapped pupils pursuant to California Education Code § 48903(h), or any state or local administrative regulation or policy purporting to authorize extended suspensions of handicapped pupils.

3. Defendants are permanently enjoined from referring plaintiffs for disciplinary proceedings with the exception of 5-schoolday suspensions authorized by California Education Code § 48903(a), pursuant to San Francisco Board of Education Policy No. 5114.

4. Defendants are permanently enjoined and shall convene and "IEP" team meeting within 5 schooldays whenever a change of placement or program is recommended as a result of the pupil's behavior or misconduct.

5. Defendants are permanently enjoined and shall determine by a majority of such IEP team whether the behavior or misconduct was or was not a manifestation of the pupil's handicap(s) or handicapping condition(s) and whether or not the pupil's current IEP, if any, is appropriate and is being correctly implemented.

6. If a majority of the IEP team determines that the pupil's behavior or conduct was a manifestation of the handicapping condition(s), defendants are permanently enjoined from subjecting the pupil to further disciplinary action.

7. Defendants are permanently enjoined from denying handicapped pupils their right to remain in their current placement pending resolution of the issues delineated in paragraph (6) above and of any proceedings relating to placement and provision of a free appropriate public education, unless the parents or guardian and the SFUSD otherwise agree.

8. Defendants are permanently enjoined and shall provide proper notice to parents or guardians of proposed changes of placement and changes in the provision of a free appropriate public education including, but not limited to, a description of procedural safeguards available to them, the action proposed by the SFUSD and the reasons therefor, the options considered, and the reason any options were rejected.

9. Defendants are permanently, [sic] enjoined from changing a handicapped student's educational placement, instruction, and/or services prior to convening an IEP team pursuant to 34 C.F.R. §§ 300.340—.349 and to review all relevant information and recommend such changes if necessary.

10. Defendants are permanently enjoined from recommending or effecting any significant change of placement, program, or services for such handicapped pupils as a result of behavior or conduct which was a manifestation of the pupil's handicaps without first conducting an evaluation of the pupil's needs in accordance with 34 C.F.R. § 104.35.

11. Defendants are permanently enjoined from applying California Education Code §§ 48212-214 to handicapped pupils regardless of the nature or severity of their handicap(s).



12. Defendants are permanently enjoined from denying plaintiffs a free and appropriate public education in the least restrictive environment or otherwise violating the provisions of 20 U.S.C. § 1401 et seq., as amended, 29 U.S.C. § 794, or the regulations promulgated thereunder.

13. Defendnts [sic] are permanently enjoined from conducting any hearing to expel or exclude plaintiffs Doe or Smith for behavior or conduct arising from their handicaps or which is a manifestation of their handicaps.

Defendants are permanently enjoined and shall expunge any and all records and notations in their students [sic] files which refer to the unlawful and enjoined disciplinary action taken against Doe and Smith or to this lawsuit, and that attendance and credit be restored to each plaintiff for the time during which he was illegally excluded from his regular educational placement.

Incorporated herein by this reference are the Preliminary Injunction issued December 12, 1980, the Memorandum Decision issued May 25, 1982, the Order issued June 17, 1983, and the Declaration and Permanent Injunction issued October 24, 1983.

Pursuant to 29 U.S.C. § 794a and 42 U.S.C. § 1988, plaintiffs, as prevailing parties, are awarded reasonable attorneys' fees and costs in an amount to be determined upon the submission of appropriate affidavits by plaintiffs' counsel.

DATED: Dec. 2, 1983

MARILYN HALL PATEL
Judge, U.S. District Court

## APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
CALIFORNIA

JOHN DOE, Plaintiff,

JACK SMITH, Plaintiff-Intervenor,

vs.

BILL MAHER, et al., Defendants.

No. C-80-4270-MHP

### ORDER AND PERMANENT INJUNCTION

Plaintiffs John Doe and Jack Smith brought this action against the San Francisco Unified School District (SFUSD), various local officials, California School Superintendent Wilson Riles individually and in his official capacity, and against the successors of those officials. Plaintiffs alleged violations of the Education Act for All Handicapped Children Act (EAHCA, 20 U.S.C. §§ 1401-1461, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the fourteenth amendment. On October 24, 1983 the court issued a Declaration and Permanent Injunction with respect to the local defendants, and both parties have now moved for summary judgment with respect to plaintiffs' claim against the State defendants. Plaintiffs seek a Declaration and Permanent Injunction with respect to the State defendants.

The parties have reached a number of stipulations and filed a joint statement of issues in conjunction with their cross motions for summary judgment. The state defendants have stipulated that in November 1980, when, without adequate proceedings having been held, plaintiffs were suspended and recommended for expulsion on the basis of actions arising out of their handicaps, there was no state policy concerning discipline of handicapped students disseminated to local educational agencies.



Having considered all of the pleadings, memoranda, and exhibits filed, as well as the oral arguments made on February 6, 1984, this court granted summary judgment to the plaintiffs against defendants Wilson Riles and his successor Bill Honig, as superintendents of the Department of Education for the State of California.

The court hereby grants plaintiffs' request for declaratory and injunctive relief against the State defendants, and declares:

### DECLARATION OF RIGHTS

Plaintiffs, as educationally handicapped children in the State of California:

1. Have the right to the full benefits and protection of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* ("EAHCA"), § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations promulgated thereto;

2. Have the right to a free and appropriate public education, as defined by the EAHCA, provided by their local educational agency ("LEA") and/or the State Department of Education ("SDE");

3. Have the right to education in the least restrictive environment suitable to their individual needs and with non-handicapped children to the extent appropriate within the meaning of the EAHCA;

4. Shall not have their educational program reduced, or be expelled, excluded, or subjected to any other disciplinary procedures, with the exception of suspensions authorized by California Education Code §§ 48901 and 48911(a), for any behavior or misconduct which is a manifestation of their handicaps or which arises out of their handicaps;

5. Shall not as a result of behavior or misconduct which is a manifestation of their handicap be denied or totally expelled or excluded from having any educational services whatsoever;

6. Have the right to have ther determination of appropriate education, placement, and services for them made by a specialized multidisciplinary "IEP" team, subject to review by the State or an impartial hearing officer;

7. Have the right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, 34 C.F.R. §§ 300.-340—.349 and 30000.500—.514 [sic];

8. Have the right to a written notice to their parents or guardians within a reasonable time before the LEA proposes to change their educational placement program or services or the provision of free appropriate public education to them, including an explanation of all procedural safeguards available to the pupil and parents, a description of why the LEA proposes to take the action, and a description of all options the LEA considered and the reasons why those options were rejected;

9. Have the right to a comprehensive evaluation, as required by 34 C.F.R. § 104.35, before having any significant changes in educational placement or program recommended by the LEA;

10. Have the right, whenever a change of placement or educational program of [sic] service is recommended as a result of their behavior or misconduct, to have a meeting of a multidisciplinary team, pursuant to 34 C.F.R. § 300.340—300.349, convened within 5 schooldays of the initiation of disciplinary action, to determine by a majority of the IEP team whether the behavior or misconduct was a manifestation of the pupil's handicap(s) and whether the pupil's current IEP, if any, is appropriate and is being correctly implemented;

11. Have the right to remain in their current placements pending the IEP team meeting or other proposal to change the educational placement of the child or the provision of a free and appropriate public education, and all administrative and judicial reviews of its determination, unless the parent or guardian and the LEA or State Department of Education agree otherwise;

12. Have the right to be free from any further disciplinary action if the IEP team determines either that the behavior or misconduct is a manifestation of or arises from the handicapping



condition, or, that the IEP is not appropriate or is not being implemented correctly.

The court further declares that:

The use of any disciplinary procedures, with the exception of 5-day suspensions authorized by California Education Code § 48911(g), against handicapped children for conduct or behavior arising out of their handicap(s), violates the EAHCA and §504.

California Education Code § 48900 *et seq.* relating to expulsion, and any state or local administrative regulation or policy promulgated pursuant thereto applied to plaintiffs as handicapped students, violates the EAHCA and § 504.

The application of California Education Code § 48911(g), or any other state statutes or regulations in aid of expulsion, exclusion, or extended suspension is based on behavior arising out of the child's handicap; and

California Education Code § 48212, and any state or local administrative regulation or policy promulgated pursuant thereto which purports to authorize exclusion of students on the basis of physical or mental handicaps violates the EAHCA and § 504.

## PERMANENT INJUNCTION

The court, having determined that the state defendants failed adequately to protect plaintiffs' rights under the EAHCA, § 504, and 42 U.S.C. § 1983, permanantly enjoins the state defendants, as follows:

1. Defendants are permanantly enjoined from referring, recommending, or otherwise processing such handicapped pupils for expulsion, exclusion, extended suspension or other disciplinary procedures, or from authorizing such actions, with the exception of 5-day suspensions authorized by California Education Code § 48911(a), as a result of behavior or misconduct which is a manifestation of or arises out of a pupil's handicap(s);

2. Defendants are permanently enjoined and shall require or convene an IEP team meeting within 5 schooldays whenever a

change of placement or program is recommended as a result of the pupil's behavior or misconduct;

3. Defendants are permanently enjoined and shall determine or require determination by a majority of such IEP team as to whether the behavior or misconduct was or was not a manifestation of the pupil's handicap(s) or handicapping condition(s) and whether or not the pupil's current IEP, if any, is appropriate and is being correctly implemented;

4. If a majority of the IEP team determines that the pupil's behavior or conduct was a manifestation of the handicapping condition(s), defendants are permanently enjoined from subjecting the pupil to further disciplinary action based on said conduct;

5. Defendants are permanently enjoined from authorizing the denial or denying handicapped pupils their right to remain in their current placement pending resolution of the issues delineated in paragraph (4) above and of any proceedings relating to placement and provision of a free appropriate public education, unless the parents or guardian and the LEA otherwise agree;

6. Defendants are permanently enjoined and shall require or provide proposed changes of placement and changes in the provision of a free appropriate public education including, but not limited to, a description of procedural safeguards available to them, the action proposed by the LEA and the reasons therefor, the options considered, and the reason any options were rejected;

7. Defendants are permanently enjoined from authorizing a change of, or changing, a handicapped student's educational placement, instruction, and/or services prior to convening an IEP team pursuant to 34 C.F.R. §§ 300.340—.349 to review all relevant information and recommend such changes if necessary;

8. Defendants are permanently enjoined from authorizing or recommending or effecting any significant changes of placement, program, or services for such handicapped pupils as a result of the pupil's behavior or conduct which was a manifestation of the pupil's handicaps without first conducting an evaluation of the pupil's needs in accordance with 34 C.F.R. § 104.35;



10. Defendants are permanently enjoined from authorizing the denial of, or otherwise denying, plaintiffs a free and appropriate public education in the least restrictive environment or otherwise violating the provisions of 20 U.S.C. § 1401 *et. seq.*, as amended, 29 U.S.C. § 794, or the regulations promulgated thereunder;

11. Defendants are permanently enjoined from authorizing any hearing to expel or exclude plaintiffs Doe or Smith for behavior or conduct arising from their handicaps or which is a manifestation of their handicaps; and

12. The court finds that there is an absence of state policy in the following areas and that the failure to adopt policy is likely to result in continued violation of the right of plaintiffs and other similarly situated handicapped students to a free appropriate public education as required by the EAHCA and, therefore, the state defendants are permanently enjoined:

(a) to provide services directly when, in any individual case, they determine that a local educational agency is unable or unwilling to establish and maintain programs of free appropriate public education; services shall be provided by the State directly when, for example, the local educational agency fails either to develop or implement an IEP determination, and also fails properly to appeal such determination to the State educational agency;

(b) to ensure that all local educational agencies within the State are carrying out the provisions of the EAHCA, thereby assuring that all handicapped children are receiving a free appropriate education as defined by that Act and as amplified in this injunction; to ensure local compliance the state defendants must either enact a policy or set of regulations implementing this injunction that will be binding upon the local educational agencies, or must establish a system of monitoring which is adequate to ensure that all the local educational agencies are complying fully with the EAHCA and this injunction; the state defendants are therefore enjoined to submit to the court for its approval, within sixty (60) days of the date of this order, either a proposed binding policy, regulations, or a proposed monitoring plan; said

policy, regulation or plan shall include provisions for assuring compliance with §§ 1--11 of this Order.

## RETENTION OF JURISDICTION

This court shall retain jurisdiction over the subjects of the complaint in this lawsuit for two (2) years from the date of this order.

IT IS SO ORDERED.



**Appendix B**

District Court Decision of April 23, 1984.

United States District Court
Northern District of California

No. C-80-4270-MHP

John Doe,
Plaintiff,
Jack Smith,
Plaintiff-Intervenor,
vs.
Bill Maher, et al.,
Defendants.

[Filed April 23, 1984]

Order and Permanent Injunction

Plaintiffs John Doe and Jack Smith brought this action against the San Francisco Unified School District (SFUSD), various local officials, California School Superintendent Wilson Riles individually and in his official capacity, and against the successors of those officials. Plaintiffs alleged violations of the Education Act for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401-1461, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the fourteenth amendment. On October 24, 1983 the court issued a Declaration and Permanent Injunction with respect to the local defendants, and both parties have now moved for summary judgment with respect to plaintiffs' claim against the State defendants. Plaintiffs seek a Declaration and Permanent Injunction with respect to the State defendants.

The parties have reached a number of stipulations and filed a joint statement of issues in conjunction with their cross motions for summary judgment. The state defendants have stipulated that in November 1980, when, without adequate proceedings having been held, plaintiffs were suspended and recommended for expulsion on the basis of actions arising out of their handicaps, "there

was no state policy concerning discipline of handicapped students disseminated to local educational agencies.

Having considered all of the pleadings, memoranda, and exhibits filed, as well as the oral arguments made on February 6, 1984, this court granted summary judgment to the plaintiffs against defendants Wilson Riles and his successor Bill Honig, as superintendents of the Department of Education for the State of California.

The court hereby grants plaintiffs' request for declaratory and injunctive relief against the State defendants, and declares:

## DECLARATION OF RIGHTS

Plaintiffs, as educationally handicapped children in the State of California:

1. Have the right to the full benefits and protection of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* ("EAHCA"), § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations promulgated thereto;

2. Have the right to a free and appropriate public education, as defined by the EAHCA, provided by their local educational agency ("LEA") and/or the State Department of Education ("SDE");

3. Have the right to education in the least restrictive environment suitable to their individual needs and with non-handicapped children to the extent appropriate within the meaning of the EAHCA;

4. Shall not have their educational program reduced, or be expelled, excluded, or subjected to any other disciplinary procedures, with the exception of suspensions authorized by California Education Code §§ 48901 and 48911(a), for any behavior or misconduct which is a manifestation of their handicaps or which arises out of their handicaps;



5. Shall not as a result of behavior or misconduct which is a manifestation of their handicap be denied or totally expelled or excluded from having any educational services whatsoever;

6. Have the right to have the determination of appropriate education, placement, and services for them made by a specialized multidisciplinary "IEP" team, subject to review by the State or an impartial hearing officer;

7. Have the right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, 34 C.F.R. §§ 300.340-.349 and 30000.500-.514;

8. Have the right to a written notice to their parents or guardians within a reasonable time before the LEA proposes to change their educational placement program or services or the provision of free appropriate public education to them, including an explanation of all procedural safeguards available to the pupil and parents, a description of why the LEA proposes to take the action, and a description of all options the LEA considered and the reasons why those options were rejected;

9. Have the right to a comprehensive evaluation, as required by 34 C.F.R. § 104.35, before having any significant changes in educational placement or program recommended by the LEA;

10. Have the right, whenever a change of placement or educational program of service is recommended as a result of their behavior or misconduct, to have a meeting of a multidisciplinary team, pursuant to 34 C.F.R. § 300.340-300.349, convened within 5 schooldays of the initiation of disciplinary action, to determine by a majority of the IEP team whether the behavior or misconduct was a manifestation of the pupil's handicap(s) and whether the pupil's current IEP, if any, is appropriate and is being correctly implemented;

11. Have the right to remain in their current placements pending the IEP team meeting or other proposal to change the educational placement of the child or the provision of a free and appropriate public education, and all administrative and judicial reviews of its determination, unless the parent or guardian and the LEA or State Department of Education agree otherwise;

12. Have the right to be free from any further disciplinary action if the IEP team determines either that the behavior or misconduct is a manifestation of or arises from the handicapping condition, or, that the IEP is not appropriate or is not being implemented correctly.

The court further declares that:

The use of any disciplinary procedures, with the exception of 5-day suspensions authorized by California Education Code § 48911(g), against handicapped children for conduct or behavior arising out of their handicap(s), violates the EAHCA and § 504;

California Education Code § 48900 *et seq.* relating to expulsion, and any state or local administrative regulation or policy promulgated pursuant thereto applied to plaintiffs as handicapped students, violates the EAHCA and § 504.

The application of California Education Code § 48911(g), or any other state statutes or regulations in aid of expulsion, exclusion, or extended suspension, violates plaintiffs' rights under the EAHCA and § 504, where such expulsion, exclusion, or extended suspension is based on behavior arising out of the child's handicap; and

California Education Code § 48212, and any state or local administrative regulation or policy promulgated pursuant thereto which purports to authorize exclusion of students on the basis of physical or mental handicaps violates the EAHCA and § 504.

## PERMANENT INJUNCTION

The court, having determined that the state defendants failed adequately to protect plaintiffs' rights under the EAHCA, § 504, and 42 U.S.C. § 1983, permanently enjoins the state defendants, as follows:

1. Defendants are permanently enjoined from referring, recommending, or otherwise processing such handicapped pupils for expulsion, exclusion, extended suspension or other disciplinary procedures, or from authorizing such actions, with the exception of 5-day suspensions authorized by California Education Code



§ 48911(a), as a result of behavior or misconduct which is a manifestation of or arises out of a pupil's handicap(s);

2. Defendants are permanently enjoined and shall require or convene an IEP team meeting within 5 schooldays whenever a change of placement or program is recommended as a result of the pupil's behavior or misconduct;

3. Defendants are permanently enjoined and shall determine or require determination by a majority of such IEP team as to whether the behavior or misconduct was or was not a manifestation of the pupil's handicap(s) or handicapping condition(s) and whether or not the pupil's current IEP, if any, is appropriate and is being correctly implemented;

4. If a majority of the IEP team determines that the pupil's behavior or conduct was a manifestation of the handicapping condition(s), defendants are permanently enjoined from subjecting the pupil to further disciplinary action or authorizing such disciplinary action based on said conduct;

5. Defendants are permanently enjoined from authorizing the denial or denying handicapped pupils their right to remain in their current placement pending resolution of the issues delineated in paragraph (4) above and of any proceedings relating to placement and provision of a free appropriate public education, unless the parents or guardian and the LEA otherwise agree;

6. Defendants are permanently enjoined and shall require or provide proper notice to parents or guardians of proposed changes of placement and changes in the provision of a free appropriate public education including, but not limited to, a description of procedural safeguards available to them, the action proposed by the LEA and the reasons therefor, the options considered, and the reason any options were rejected;

7. Defendants are permanently enjoined from authorizing a change of, or changing, a handicapped student's educational placement, instruction, and/or services prior to convening an IEP team pursuant to 34 C.F.R. §§ 300.340-.349 to review all relevant information and recommend such changes if necessary;

8. Defendants are permanently enjoined from authorizing or recommending or effecting any significant change of placement, program, or services for such handicapped pupils as a result of the pupil's behavior or conduct which was a manifestation of the pupil's handicaps without first conducting an evaluation of the pupil's needs in accordance with 34 C.F.R. § 104.35;

9. Defendants are permanently enjoined from authorizing the application of, or applying, California Education Code § 48212 to handicapped pupils regardless of the nature or severity of their handicap(s);

10. Defendants are permanently enjoined from authorizing the denial of, or otherwise denying, plaintiffs a free and appropriate public education in the least restrictive environment or otherwise violating the provisions of 20 U.S.C. § 1401 *et seq.*, as amended, 29 U.S.C. § 794, or the regulations promulgated thereunder;

11. Defendants are permanently enjoined from authorizing any hearing to expel or exclude plaintiffs Doe or Smith for behavior or conduct arising from their handicaps or which is a manifestation of their handicaps;

12. The court finds that there is an absence of state policy in the following areas and that the failure to adopt policy is likely to result in continued violation of the right of plaintiffs and other similarly situated handicapped students to a free appropriate public education as required by the EAHCA and, therefore, the state defendants are permanently enjoined:

(a) to provide services directly when, in any individual case, they determine that a local educational agency is unable or unwilling to establish and maintain programs of free appropriate public education; services shall be provided by the State directly when, for example, the local educational agency fails either to develop or implement an IEP determination, and also fails properly to appeal such determination to the State educational agency;

(b) to ensure that all local educational agencies within the State are carrying out the provisions of the EAHCA,



thereby assuring that all handicapped children are receiving a free appropriate education as defined by that Act and as amplified in this injunction; to ensure local compliance the state defendants must either enact a policy or set of regulations implementing this injunction that will be binding upon the local educational agencies, or must establish a system of monitoring which is adequate to ensure that all the local educational agencies are complying fully with the EAHCA and this injunction; the state defendants are therefore enjoined to submit to the court for its approval, within sixty (60) days of the date of this order, either a proposed binding policy, regulations, or a proposed monitoring plan; said policy, regulation or plan shall include provisions for assuring compliance with ¶¶ 1-11 of this Order.

## RETENTION OF JURISDICTION

This court shall retain jurisdiction over the subjects of the complaint in this lawsuit for two (2) years from the date of this order.

IT IS SO ORDERED.

Dated: April 23, 1984

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

## APPENDIX C

20 U.S.C. § 1401 et seq.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1411 of this title.

§ 1401. Definitions

As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) Omitted

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.



(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician, and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however*, That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education or training offered.



(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special

education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I [20 U.S.C. 2701 et seq.] or title VII [20 U.S.C. 3221 et seq.] of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.



(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act [20 U.S.C. 3223(a)(2)].

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(Pub. L. 91-230, title VI, § 602, Apr. 13, 1970, 84 Stat. 175; Pub. L. 94-142, § 4(a), Nov. 29, 1975, 89 Stat. 775; Pub. L. 96-88, title III, § 301(a)(1),(2)(H), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## REFERENCES IN TEXT

This Act, referred to in par. (11)(E), is Pub. L. 91-230, Apr. 13, 1970, 84 Stat. 121, as amended, which is popularly known as the Elementary and Secondary Education Amendments of 1970. For complete classification of this Act to the Code, see Short Title of 1970 Amendment note set out under section 2701 of this title and Tables.

The Elementary and Secondary Education Act of 1965, referred to in par. (20), is Pub. L. 89-10, Apr. 11, 1965, 79 Stat. 27, as amended generally by Pub. L. 95-561, Nov. 1, 1978, 92 Stat. 2152. Title I of the 1965 Act, which was formerly classified to subchapter II (§ 241a et seq.) of chapter 13 of this title, is classified generally to subchapter I (§ 2701 et seq.) of chapter 47 of this title. Title VII of that Act, known as the Bilingual Education Act, was formerly classified to subchapter IV-A (§ 880b et seq.) of chapter 24 of this title, and is classified generally to subchapter VII (§ 3221 et seq.) of chapter 47 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

## CODIFICATION

Par. (2), which in the original read "The term 'Commissioner' means the Commissioner of Education", has been omitted in view of the transfer of all functions of the Commissioner of Education to the Secretary of Education pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title. This transfer would result in the definition in par. (2) being identical to the definition in par. (14).

## AMENDMENTS

1975—Par. (1). Pub. L. 94-142, § 4(a)(1), substituted "orthopedically impaired" for "crippled" and inserted reference to children with specific learning disabilities.

Par. (5). Pub. L. 94-142, § 4(a)(2), inserted reference to telecommunications, sensory, and other technological aids and devices.

Par. (15). Pub. L. 94-142, § 4(a)(3), added children with learning problems which are primarily the result of cultural or economic disadvantage to the enumeration of children not to be included within the term "children with specific learning disabilities".

Pars. (16) to (22). Pub. L. 94-142, § 4(a)(4), added pars. (16) to (22).

## EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94-142 effective Oct. 1, 1977, see section 8(c) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in par. (11)(E), and "Secretary of Education" was substituted for "Secretary of Health, Education, and Welfare" in par. (14), pursuant to sections 301(a)(1), (2)(H) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1), (2)(H) and 3507 of this title and which transferred all functions of the Commissioner of Education and all functions of the Secretary of Health, Education, and Welfare under this chapter to the Secretary of Education.



## TERMINATION OF ADVISORY COMMITTEE

The National Advisory Committee on Handicapped Children terminated Oct. 1, 1977 pursuant to section 1403 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 238, 244, 1087ee, 1119b-4, 2771, 3112 of this title; title 42 section 9835.

### § 1402. Bureau for education and training of the handicapped

#### (a) Establishment; purposes

There shall be, within the Department of Education, a bureau for the education and training of the handicapped which shall be the principal agency in the Department of Education for administering and carrying out programs and projects relating to the education and training of the handicapped, including programs and projects for the training of teachers of the handicapped and for research in such education and training.

#### (b) Deputy Commissioner; appointment and compensation; Associate Deputy Commissioner and other assistants

(1) The Bureau established under subsection (a) of this section shall be headed by a Deputy Commissioner of Education who shall be appointed by the Secretary of Education, who shall report directly to the Secretary, be compensated at the rate specified for, and placed in, grade 18 of the General Schedule set forth in section 5332 of title 5.

(2) In addition to such Deputy Commissioner, there shall be placed in such Bureau five positions for persons to assist the Deputy Commissioner in carrying out his duties, including the position of Associate Deputy Commissioner, and such positions

shall be placed in grade 16 of the General Schedule set forth in section 5332 of title 5.

(Pub. L. 91-230, title VI, § 603, Apr. 13, 1970, 84 Stat. 177; Pub. L. 93-380, title VI, § 612(a), Aug. 21, 1974, 88 Stat. 579; Pub. L. 96-88, title III, § 301(a)(1), (b)(2), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 678, 692.)

## AMENDMENTS

1974—Pub. L. 93-380 designated existing provisions as subsec. (a) and added subsec. (b).

## EFFECTIVE DATE OF 1974 AMENDMENT

Section 612(b)(2) of Pub. L. 93-380 provided that: "The amendments made by subsection (a) [amending this section] shall become effective upon the enactment of this Act [Aug. 21, 1974]."

## TRANSFER OF FUNCTIONS

"Department of Education" and "Secretary", meaning the Secretary of Education, were substituted for "Office of Education" and "Commissioner", respectively, in subsecs. (a) and (b)(1) pursuant to sections 301(a)(1), (b)(2) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1), (b)(2) and 3507 of this title and which transferred the Office of Education to the Department of Education and transferred the functions of the Commissioner of Education to the Secretary of Education.

For authority of Secretary of Education to consolidate, alter, or discontinue the bureau for education and training of the handicapped, or to reallocate any functions vested by statute in the bureau, see section 413 of Pub. L. 96-88, which is classified to section 3473 of this title.



## DEPUTY COMMISSIONER AND ASSOCIATE DEPUTY COMMISSIONER OF EDUCATION AND OTHER ASSISTANTS; ADDITIONAL POSITIONS

Section 612(b)(1) of Pub. L. 93-380, as amended by Pub. L. 94-482, title V, § 501(a)(11), Oct. 12, 1976, 90 Stat. 2235, provided that: "The positions created by subsection (b) of section 603 of the Education of the Handicapped Act [subsec. (b) of this section] shall be in addition to the number of positions placed in the appropriate grades under section 5108 of title 5, United States Code and such positions shall be in addition to, and without prejudice against, the number of positions otherwise placed in the Office of Education [now Department of Education] under such section 5108 or under other law. Nothing in this section shall be deemed as limiting the Commissioner [now Secretary of Education] from assigning additional General Schedule positions in grades 16, 17, and 18 to the Bureau should he determine such additions to be necessary to operate programs for educating handicapped children authorized by this Act [see Short Title note for Pub. L. 93-380, set out under section 2701 of this title]."

Provision effective on and after sixtieth day after Aug. 21, 1974, see section 2(c) of Pub. L. 93-380, set out as an Effective Date of 1974 Amendment note under section 244 of this title.

§ 1403. Omitted

## CODIFICATION

Section, Pub. L. 91-230, title VI, § 604, Apr. 13, 1970, 84 Stat. 177; Pub. L. 93-380, title VI, § 613, Aug. 21, 1974, 88 Stat. 580; Pub. L. 94-273, § § 3(14), 13(2), Apr. 21, 1976, 90 Stat. 376, 378, provided for the establishment of the National Advisory Committee on Handicapped Children, and the termination of the Committee on Oct. 1, 1977.

§ 1404. Acquisition of equipment and construction of necessary facilities

(a) Authorization for use of funds

In the case of any program authorized by this chapter, if the Secretary determines that such program will be improved by

permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, he may authorize the use of such funds for such purposes.

(b) Recovery of payments under certain conditions

If within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this chapter the facility constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which the facility is situated.

(Pub. L. 91-230, title VI, § 605, Apr. 13, 1970, 84 Stat. 177; Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsec. (a) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

§ 1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter.

(Pub. L. 91-230, title VI, § 606, as added Pub. L. 94-142, § 6(a), Nov. 29, 1975, 89 Stat. 795.)



## EFFECTIVE DATE

Section effective Nov. 29, 1975, see section 8(b) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

§ 1406. Removal of architectural barriers

(a) Grants

Upon application by any State or local educational agency or intermediate educational unit the Secretary is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Pub. Law 90-480) [42 U.S.C. 4151 et seq.], relating to architectural barriers.

(b) Authorization of appropriations

For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

(Pub. L. 91-230, title VI, § 607, as added Pub. L. 94-142, § 6(a), Nov. 29, 1975, 89 Stat. 795, and amended Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## REFERENCE IN TEXT

The Act approved August 12, 1968 (Public Law 90-480), referred to in subsec. (a), is Pub. L. 90-480, Aug. 12, 1968, 82 Stat. 718, as amended, which is popularly known as the Architectural Barriers Act of 1968. The Act is classified generally to chapter 51 (§ 1451 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4151 of Title 42 and Tables.

## EFFECTIVE DATE

Section effective Nov. 29, 1975, see section 8(b) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsec. (a) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SUBCHAPTER II—ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

### § 1411. Entitlements and allocations

(a) Formula for determining maximum State entitlement

(1) Except as provided in paragraph (3) and in section 1419 of this title, the maximum amount of the grant to which a State is entitled under this subchapter for any fiscal year shall be equal to—

(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average



per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

(2) For the purpose of this subsection and subsection (b) through subsection (e) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to number of such children receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure", in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5)(A) In determining the allotment of each State under paragraph (1), the Secretary may not count—

(i) handicapped children in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State; and

(ii) handicapped children who are counted under section 241c-1 of this title.

(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Secretary on the basis of the most recent satisfactory data available to him.

(b) Distribution and use of grant funds by States for fiscal year ending September 30, 1978

(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1978—

(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 1412(3) of this title.

(2) Of the funds which any State may use under paragraph (1)(A)—

(A) an amount which is equal to the greater of—

(i) 5 per centum of the total amount of funds received under this subchapter by such State; or

(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 1412 and 1413 of this title;

(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412(3) of this title.

(c) Distribution and use of grant funds by States for fiscal years ending September 30, 1979, and thereafter

(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—



(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 1412(3) of this title.

(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)—

(i) an amount which is equal to the greater of—

(I) 5 per centum of the total amount of funds received under this subchapter by such State; or

(II) $300,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 1412 and 1413 of this title; and

(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412(3) of this title.

(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provisions of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section 1413(a)(9) of this title shall not apply with respect to amounts available for use by any State under paragraph (2).

(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of this section, to less than $7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

(d) Allocation of funds within States to local educational agencies and intermediate educational units

From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this subchapter.

(e) Territories and possessions

(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 1400(c) of this title in an amount equal to an amount determined by the



Secretary in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this subchapter for that fiscal year. If the aggregate of the amounts, determined by the Secretary pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

(f) Indian reservations

(1) The Secretary is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregated amounts available to all States under this subchapter for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Secretary an application which meets the applicable requirements of section 1414(a) of this title and which is approved by the Secretary. The provisions of section 1416 of this title shall apply to any such application.

(g) Reductions or increases

(1) If the sums appropriated for any fiscal year for making payments to States under this subchapter are not sufficient to pay in full the total amounts which all States are entitled to receive under this subchapter for such fiscal year, the maximum amounts which all States are entitled to receive under this subchapter for

such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d) of this section, which it estimates that it will expend in accordance with the provisions of this subchapter. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this subchapter, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(Pub. L. 91-230, title VI, § 611, Apr. 13, 1970, 84 Stat. 178; Pub. L. 93-380, title VI, § 614(a), (e)(1), (2), Aug. 21, 1974, 88 Stat. 580, 582; Pub. L. 94-142, §§ 2(a)(1)-(3), 5(a), (c), Nov. 29, 1975, 89 Stat. 773, 776, 794; Pub. L. 95-561, title XIII, § 1341(a), Nov. 1, 1978, 92 Stat. 2364; Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub. L. 96-270, § 13, June 14, 1980, 94 Stat. 498.)



## REFERENCES IN TEXT

Section 241c-1 of this title, referred to in subsec. (a)(5)(A)(ii), was in the original "section 121 of the Elementary and Secondary Education Act of 1965" and was repealed by Pub. L. 95-561, title I, § 101(c), Nov. 1, 1978, 92 Stat. 2200. See section 2771 et seq. of this title.

## AMENDMENTS

1980—Subsec. (c)(2)(A)(i)(II). Pub. L. 96-270 substituted "$300,000" for "$200,000".

1978—Subsec. (a)(3). Pub. L. 95-561 substituted "equal to the number of such children" for "equal to the average of the number of such children" and "December 1 of the fiscal year" for "October 1 and February 1 of the fiscal year".

1975—Pub. L. 94-142, § 5(a), effective Oct. 1, 1977, completely revised the section so as to incorporate within its provisions the authority for the basic entitlement and allocation of funds, the formula for determining State entitlement, the distribution of grant funds within the State, coverage for territories and possessions, coverage for Indian reservations, and reductions or increases in funds and allocations. Pending the effective date of that revision, Pub. L. 94-142 amended this section as it applies through the end of the fiscal year ending Sept. 30, 1977, as described hereunder.

Subsec. (a)(5)(A). Pub. L. 94-142, § 5(c), effective on the date upon which final regulations prescribed by the Commissioner under section 5(b) of Pub. L. 94-142 take effect, struck out provision in section as effective Oct. 1, 1977, that, in determining the allotment of each State, the Commissioner may not count, as part of the figure of 12 per centum of the number of all children aged five to seventeen in the State, any children with specific learning disabilities to the extent that the number of those children is greater than one-sixth of that percentage.

Subsec. (b)(2). Pub. L. 94-142, § 2(a)(1)(A), effective for the period from July 1, 1975, through the end of the fiscal year

ending Sept. 30, 1977, deleted the Commonwealth of Puerto Rico from the definition of "State".

Subsec. (c)(1). Pub. L. 94-142, § 2(a)(1)(B), effective for the period from July 1, 1975, through the end of the fiscal year ending Sept. 30, 1977, deleted the Commonwealth of Puerto Rico from the enumeration of territories and possessions to which subsec. (c) applies.

Subsec. (c)(2). Pub. L. 94-142, § 2(a)(2), effective for the period from July 1, 1975, through the end of the fiscal year ending Sept. 30, 1977, substituted "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977" for "year ending June 30, 1975" and "1 per centum" for "2 per centum".

Subsec. (d). Pub. L. 94-142, § 2(a)(3), effective for the period from July 1, 1975, through the end of the fiscal year ending Sept. 30, 1977, substituted "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977" for "year ending June 30, 1975".

1974—Pub. L. 93-380, § 614(a), amended provisions as follows:

"Section 614(a) of Pub. L. 93-380 enacted provisions for grants to States and Territories and assistance for Indian Reservation schools for education of handicapped children, effective for fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending Sept. 30, 1976, and for the fiscal year ending Sept. 30, 1977."

Subsec. (a). Pub. L. 93-380, § 614(e)(1), inserted provision for grants "in order to provide full educational opportunity to all handicapped children", effective July 1, 1975.

Subsec. (b). Pub. L. 93-380, § 614(e)(2), substituted appropriations authorization of $100,000,000 and $110,000,000 for fiscal years ending June 30, 1976, and 1977, for prior authorization of $200,000,000; $210,000,000; and $220,000,000 for fiscal years ending June 30, 1971 through 1973, effective July 1, 1975.



## EFFECTIVE DATE OF 1978 AMENDMENT

Section 1341(b) of Pub. L. 95-561 provided that: "The amendments made by subsection (a) of this section [amending this section] shall take effect with respect to determinations made in fiscal year 1979 and thereafter."

## EFFECTIVE DATE OF 1975 AMENDMENT

Section 5(c) of Pub. L. 94-142 provided in part that the amendment of subsec. (a)(5)(A) by section 5(c) of Pub. L. 94-142 is effective on the date upon which final regulations prescribed by the Commissioner of Education under section 5(b) of Pub. L. 94-142, set out as a note below, take effect.

Section 8 of Pub. L. 94-142 provided that:

"(a) Notwithstanding any other provision of law, the amendments made by sections 2(a), 2(b), and 2(c) [amending subsecs. (b)(2), (c)(1), (c)(2), and (d) of this section and section 1412(a) of this title as in effect through Sept. 30, 1977, and amending provisions set out as notes under this section and sections 1412 and 1413 of this title] shall take effect on July 1, 1975.

"(b) The amendments made by sections 2(d), 2(e), 3, 6, and 7 [enacting sections 1405, 1406, and 1412(d) of this title, amending sections 1232 and 1453 of this title, enacting provisions set out as a note under this section, and amending provisions set out as a note under section 1401 of this title] shall take effect on the date of the enactment of this Act [Nov. 29, 1975].

"(c) The amendments made by sections 4 and 5(a) [enacting sections 1415 to 1420 of this title and amending sections 1401, 1411, 1412, 1413, and 1414 of this title] shall take effect on October 1, 1977, except that the provisions of clauses (A), (C), (D), and (E) of paragraph (2) of section 612 of the Act [section 1412 of this title], as amended by this Act, section 617(a)(1)(D) of the Act [section 1417(a)(1)(D) of this title], as amended by this Act, section 617(b) of the Act [section 1417(b) of this title], as amended by this Act, and section 618(a) of the Act [section 1418(a) of this title], as amended by

this Act, shall take effect on the date of the enactment of this Act [Nov. 29, 1975].

"(d) The provisions of section 5(b) [amending this section and enacting provisions set out as notes under this section] shall take effect on the date of the enactment of this Act [Nov. 29, 1975]."

## EFFECTIVE DATE OF 1974 AMENDMENT

Pub. L. 93-380, § 614(a), which, as originally enacted, provided that the 1974 amendment of this section by section 614(a) of Pub. L. 93-380 was effective for fiscal year 1975 only, was amended by section 2(b)(1) of Pub. L. 94-142 to extend the life of the amendment of this section by section 614(a) of Pub. L. 93-380 by making it effective for the fiscal years ending June 30, 1975, and 1976, the period beginning July 1, 1976, and ending Sept. 30, 1976, and the fiscal year ending Sept. 30, 1977.

Section 614(e)(3) of Pub. L. 93-380 provided that: "The amendments made by subsection (e) [amending subsecs. (a) and (b) of this section] shall become effective and shall be deemed to have been enacted on July 1, 1975."

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsecs. (a)(5), (e)(2), and (f) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## LIMITATION ON AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 1982, 1983, AND 1984

Pub. L. 97-35, title VI, § 602(a)(1), Aug. 13, 1981, 95 Stat. 483, provided that: "There is authorized to be appropriated to carry out part B of the Education of the Handicapped Act [this subchapter], other than sections 618 and 619 [sections 1418 and 1419 of this title], $969,850,000 for fiscal year 1982, and $1,017,900,000 for each of the fiscal years 1983 and 1984."



## AUTHORIZATION OF APPROPRIATIONS

Section 2(e) of Pub. L. 94-142 provided that: "Notwithstanding the provision of section 611 of the Act [this section] as in effect during the fiscal years 1976 and 1977, there are authorized to be appropriated $100,000,000 for the fiscal year 1976, such sums as may be necessary for the period beginning July 1, 1976, and ending September 30, 1976, and $200,000,000 for the fiscal year 1977, to carry out the provisions of part B of the Act [this subchapter], as in effect during such fiscal years."

## RULES AND REGULATIONS FOR DETERMINING SPECIFIC LEARNING DISABILITIES, DIAGNOSTIC PROCEDURES, AND MONITORING PROCEDURES; PROMULGATION BY COMMISSIONER OF EDUCATION; REVIEW OF REGULATIONS BY CONGRESSIONAL COMMITTEES

Section 5(b) of Pub. L. 94-142 provided that:

"(1) The Commissioner of Education shall, no later than one year after the effective date of this subsection [Nov. 29, 1975], prescribe—

"(A) regulations which establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability for purposes of designating children with specific learning disabilities;

"(B) regulations which establish and describe diagnostic procedures which shall be used in determining whether a particlar child has a disorder or condition which places such child in the category of children with specific learning disabilities; and

"(C) regulations which establish monitoring procedures which will be used to determine if State educational agencies, local educational agencies, and intermediate educational units are complying wiht the criterial established under clause (A) and clause (B).

"(2) The Commissioner shall submit any proposed regulation written under paragraph (1) to the Committee on Education and

Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate, for review and comment by each such committee, at least fifteen days before such regulations is published in the Federal Register.

"(3) If the Commissioner determines, as a result of the promulagation of regulations under paragraph (1), that changes are necessary in the definition of the term 'children with specific learning disabilities', as such term is defined by section 602(15) of the Act [section 1401(15) of this title], he shall submit recommendations for legislation with respect to such changes to each House of the Congress.

"(4) For the purposes of this sebsection:

"(A) The term 'children with specific learning disabilites' means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.

"(B) The term 'Commissioner' means the Commissioner of Education."

## DUTIES AND RESPONSIBILITIES OF SECRETARY OF THE INTERIOR RESPECTING FUNDS

Pub. L. 92-318, title IV, § 421(b)(2), June 23, 1972, 86 Stat. 341, provided that: "For the purposes of titles II and III of the Elementary and Secondary Education Act of 1965 [former sections 821 et seq. and 841 et seq. of this title] and part B of title VI of Public Law 91-230 [sections 1411 to 1414 of this title], the Secretary of Interior shall have the same duties and responsibilities with respect to funds paid to him under such titles, as he



would have if the Department of the Interior were a State educational agency having responsibility for the administration of a State plan under such titles."

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1413, 1414, 1418, 1419 of this title.

## § 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary thoughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent

with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care



facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

(Pub. L. 91-230, title VI, § 612, Apr. 13, 1970, 84 Stat. 178; Pub. L. 92-318, title IV, § 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub. L. 93-380, title VI, §§ 614(b), (f)(1), 615(a), title VIII, § 843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub. L. 94-142, §§ 2(a)(4), (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774,

780; Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## AMENDMENTS

1975—Pub. L. 94-142, § 5(a), effective Oct. 1, 1977, completely revised the section so as to incorporate within its provisions seven conditions which must be met by States in order to qualify for assistance. Pending the effective date of that revision, Pub. L. 94-142 amended this section as it applies through the end of the fiscal year ending Sept. 30, 1977, as described hereunder.

Subsec. (a). Pub. L. 94-142, § 2(a)(4), (c), effective for the period from July 1, 1975, through the end of the fiscal year ending Sept. 30, 1977, substituted "years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977" for "year ending June 30, 1975" and "preceding fiscal year" for "fiscal year 1974" and added ", or $300,000, whichever is greater" following "preceding fiscal year".

Subsec. (d). Pub. L. 94-142, § 2(d), effective for the period from Nov. 29, 1975, through the end of the fiscal year ending Sept. 30, 1977, added subsec. (d).

1974—Pub. L. 93-380, § 614(b), amended provisions as follows:

"Section 614(b) of Pub. L. 93-380 enacted provisions for allocations of appropriations to States, basis for such allocations, and reductions or increments thereof, effective for fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending Sept. 30, 1976, and for fiscal year ending Sept. 30, 1977."

Subsec. (a)(1). Pub. L. 93-380, § 843(b)(3), reduced rate from "3" to "1" per centum, effective after June 30, 1975.

Subsec. (a)(1)(A). Pub. L. 93-380, § 843(b)(1), struck "Puerto Rico," preceding "Guam", effective after June 30, 1975.

Subsec. (a)(1)(B). Pub. L. 93-380, § 614(f)(1), substituted "1977" for "1973", effective on and after July 1, 1973.



Subsec. (a)(2). Pub. L. 93-380, §§ 615(a)(1), 843(b)(2), substituted $300,000 for $200,000, effective on and after July 1, 1975; and struck out "the Commonwealth of Puerto Rico," preceding "Guam", effective after June 30, 1975.

Subsec. (a)(3). Pub. L. 93-380, § 615(a)(2), added par. (3), effective on and after July 1, 1975.

1972—Subsec. (a)(1)(B). Pub. L. 92-318 substituted "July 1, 1973" for "July 1, 1972".

## EFFECTIVE DATE OF 1975 AMENDMENT

Amendment of subsec. (a) as in effect through Sept. 30, 1977, by section 2(a)(4) and (c) of Pub. L. 94-142 effective July 1, 1975, see section 8(a) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

Enactment of subsec. (d) as in effect through Sept. 30, 1977, by section 2(d) of Pub. L. 94-142 effective Nov. 29, 1975, see section 8(b) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

Complete revision of this section by section 5(a) of Pub. L. 94-142 effective Oct. 1, 1977, except for clauses (A), (C), (D), and (E) of par. (2) of this section as so revised which are effective Nov. 29, 1975, see section 8(c) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## EFFECTIVE DATE OF 1974 AMENDMENT

Section 614(b) of Pub. L. 93-380 which, as originally enacted, provided that the 1974 amendment of this section by section 614(b) of Pub. L. 93-380 was effective for fiscal year 1975 only, was amended by section 2(b)(2) of Pub. L. 94-142 to extend the life of the amendment of this section by section 614(b) of Pub. L. 93-380 by making it effective for the fiscal years ending June 30, 1975, and 1976, the period beginning July 1, 1976, and ending Sept. 30, 1976, and the fiscal year ending Sept. 30, 1977.

Section 843(b) of Pub. L. 93-380 provided that amendment of subsec. (a)(1), (1)(A), and (2) of this section and section 1413(a)(1) of this title by Pub. L. 93-380 shall be effective after June 30, 1975.

Section 614(f)(2) of Pub. L. 93-380 provided that: "The amendment made by this subsection [amending subsec. (a)(1)(B) of this section] shall be effective on and after July 1, 1973.

Section 615(a) of Pub. L. 93-380 provided that amendment of subsec. (a)(2) and enactment of subsec. (a)(3) by section 615(a) shall be effective on and after July 1, 1975.

Section 615(d) of Pub. L. 93-380 provided that: "The amendment made by subsections (a)(1) and (b) of this section [amending subsec. (a)(2) of this section and section 1413(a)(1) of this title] shall be effective in any fiscal year for which the aggregate of the amounts allotted to the States for that fiscal year for carrying out part B of the Education of the Handicapped Act [this subchapter] is $45,000,000 or more."

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in text pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## FISCAL YEAR TRANSITION PERIOD OF JULY 1, 1976, THROUGH SEPTEMBER 30, 1976, DEEMED PART OF FISCAL YEAR BEGINNING OCTOBER 1, 1976

Fiscal year transition period of July 1, 1976, through Sept. 30, 1976, deemed part of fiscal year beginning Oct. 1, 1976, for purposes of this section, see Pub. L. 94-274, title II, § 205(8), Apr. 21, 1976, 90 Stat. 393, set out as a note under section 5532 of Title 5, Government Organization and Employees.



## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1400, 1411, 1413, 1414, 1416, 1418, 1419 of this title; title 29 section 796d.

### § 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and

disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;



(7) provide for (A) making such reports in such form and containing such information as the Secretary may require to carry out his functions under this subchapter, and (B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter (a) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title; and

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in

or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the state in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and (C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of his responsibilities under section 1418 of this title.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) Notice and hearing prior to disapproval of plan

The Secretary shall approve any State plan and any modification thereof which—

(1) is submitted by a State eligible in accordance with section 1412 of this title; and

(2) meets the requirements of subsection (a) and subsection (b) of this section.

The Secretary shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(Pub. L. 91-230, title VI, § 613, Apr. 13, 1970, 84 Stat. 179; Pub. L. 93-380, title VI, §§ 614(c), (d), 615(b), (c), title VIII,



§ 843(b)(2), Aug. 21, 1974, 88 Stat. 581, 583, 611; Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 782; Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## REFERENCES IN TEXT

Section 241c-1 of this title, referred to in subsec. (a)(2), was in the original "section 121 of the Elementary and Secondary Education Act of 1965" and was repealed by Pub. L. 95-561, title I, § 101(c), Nov. 1, 1978, 92 Stat. 2200. See section 2771 et seq. of this title.

Section 844a(b)(8) of this title, referred to in subsec. (a)(2), was in the original "section 305(b)(8) of such Act (20 U.S.C. 844a(b)(8))" meaning section 305 of title III of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, title III, § 305, as added Pub. L. 90-247, title I, § 131, Jan. 2, 1968, 91 Stat. 792, which was omitted in the general revision of title III of the Elementary and Secondary Education Act of 1965 by Pub. L. 95-561, title III, § 301, Nov. 1, 1978, 92 Stat. 2210.

Section 1262 of this title, referred to in subsec. (a)(2), has been omitted. See section 2330(b) of this title.

## AMENDMENTS

1975—Pub. L. 94-142, § 5(a), effective Oct. 1, 1977, completely revised the section so as to incorporate within its provisions updated features which any State plan must have when submitted to the Commissioner through its State educational agency and so as to strike out provisions covering the administrative proceedings and judicial review attendant upon the submission of a State plan. See sections 1414 et seq. of this title.

1974—Subsec. (a). Pub. L. 93-380, § 614(c), substituted in first sentence "is entitled to receive payments" for "desires to receive grants", effective for fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending Sept. 30, 1976, and for the fiscal year ending Sept. 30, 1977.

Subsec. (a)(1). Pub. L. 93-380, §§ 615(b), 843(b)(2), substituted $200,000 for $100,000 and struck out "the Commonwealth of Puerto Rico," preceding "Guam".

Subsec. (a)(12), (13). Pub. L. 93-380, § 614(d), added pars. (12) and (13).

Subsec. (b). Pub. L. 93-380, § 615(c)(1), added subsec. (b). Former subsec. (b) redesignated (c).

Subsecs. (c), (d). Pub. L. 93-380, § 615(c)(1), redesignated former subsecs. (b) and (c) as (c) and (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 93-380, § 615(c)(1), (2), redesignated former subsec. (d) as (e) and substituted in par. (1) reference to subsection "(d)" for "(c)" of this section.

## EFFECTIVE DATE OF 1975 AMENDMENT

Complete revision of this section by section 5(a) of Pub. L. 94-142 effective Oct. 1, 1977, see section 8(c) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## EFFECTIVE DATE OF 1974 AMENDMENT

Section 614(c) of Pub. L. 93-380 which, as originally enacted, provided that the amendment of subsec. (a) by section 614(c) of Pub. L. 93-380 was effective for fiscal year 1975 only, was amended by section 2(b)(3) of Pub. L. 94-142 to extend the life of the amendment by section 614(c) of Pub. L. 93-380 by making it effective for the fiscal years ending June 30, 1975, and 1976, the period beginning July 1, 1976, and ending Sept. 30, 1976, and the fiscal year ending Sept. 30, 1977.

Amendment of subsec. (a)(1) by Pub. L. 93-380 effective after June 30, 1975, see section 843(b) of Pub. L. 93-380, set out as an Effective Date of 1974 Amendment note under section 1412 of this title.

Enactment of subsec. (a)(12), (13) by section 614(d) of Pub. L. 93-380 effective on and after sixtieth day after Aug. 21, 1974,



see section 2(c) of Pub. L. 93-380, set out as an Effective Date of 1974 Amendment note under section 244 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsecs. (a) and (c) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1411, 1412, 1414 to 1416, 1419, 2306 of this title.

### § 1414. Application

#### (a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of the title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and



local funds will be used in the jurisdicton of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provided that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.



(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c) Consolidated applications

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regaulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such

intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all



handicapped children residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

(Pub. L. 91-230, title VI, § 614, Apr. 13, 1970, 84 Stat. 181; Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 784; Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## AMENDMENTS

1975—Pub. L. 94-142, effective Oct. 1, 1977, completely revised the section so as to incorporate within its provisions the process through which local educational agencies and intermediate educational units desiring to receive payments submit applications to the appropriate State educational agency and so as to eliminate former provisions covering State matching funds.

## EFFECTIVE DATE OF 1975 AMENDMENT

Complete revision of this section by section 5(a) of Pub. L. 94-142 effective Oct. 1, 1977, see section 8(c) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsec. (b)(1) pursuant to sections

intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all



handicapped children residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

(Pub. L. 91-230, title VI, § 614, Apr. 13, 1970, 84 Stat. 181; Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 784; Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## AMENDMENTS

1975—Pub. L. 94-142, effective Oct. 1, 1977, completely revised the section so as to incorporate within its provisions the process through which local educational agencies and intermediate educational units desiring to receive payments submit applications to the appropriate State educational agency and so as to eliminate former provisions covering State matching funds.

## EFFECTIVE DATE OF 1975 AMENDMENT

Complete revision of this section by section 5(a) of Pub. L. 94-142 effective Oct. 1, 1977, see section 8(c) of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsec. (b)(1) pursuant to sections

301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1401, 1411, 1412, 1413, 1418, 1420 of this title; title 29 section 796d.

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintin procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;



(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be

301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1401, 1411, 1412, 1413, 1418, 1420 of this title; title 29 section 796d.

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintin procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;



(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be

accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.



(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(Pub. L. 91-230, title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.)

## EFFECTIVE DATE

Section effective Oct. 1, 1977, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1412, 1414 of this title.

§ 1416. Withholding of payments

(a) Failure to comply with this subchapter; limitations; public notice

Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Secretary (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his

accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.



(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(Pub. L. 91-230, title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.)

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(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Secretary (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his

jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Secretary withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b) Judicial review

(1) If any State is dissatisfied with the Secretary's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(2) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good



cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1454 of title 28.

(Pub. L. 91-230, title VI, § 616, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 789, and amended Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## EFFECTIVE DATE

Section effective Oct. 1, 1977, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in text and "Secretary's" was substituted for "Commissioner's" in subsec. (b)(1) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Secretary withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

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## EFFECTIVE DATE

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"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in text and "Secretary's" was substituted for "Commissioner's" in subsec. (b)(1) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1411, 1414 of this title.

§ 1417. Administration

(a) Duties of Secretary

(1) In carrying out his duties under this subchapter, the Secretary shall—

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

(c) Protection of rights and privacy of parents and students

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary



and by State and local educational agencies pursuant to the provisions of this subchapter.

(d) Hiring of qualified personnel

The Secretary is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out his duties under subsection (a)(1) of this section without regard to the provisions of title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

(Pub. L. 91-230, title VI, § 617, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 791, and amended Pub. L. 96-88, title III, § 301(a)(1), (2)(H), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## REFERENCES IN TEXT

The provisions of title 5 relating to appointments in the competitive service, referred to in subsec. (d), are classified to section 3301 et seq. of Title 5, Government Organization and Employees.

## CODIFICATION

In subsec. (b), the words "(and the Secretary, in carrying out the provisions of subsection (c) of this section)", preceding "shall issue", have been omitted as redundant in view of the transfer of functions of both the Commissioner of Education and the Secretary of Health, Education, and Welfare under this chapter to the Secretary of Education by sections 301(a)(1), (2)(H) and 507 of Pub. L. 96-88, and the concomitant substitution of "the Secretary" for "the Commissioner" following "of this subchapter,".

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1411, 1414 of this title.

§ 1417. Administration

(a) Duties of Secretary

(1) In carrying out his duties under this subchapter, the Secretary shall—

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

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In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

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(Pub. L. 91-230, title VI, § 617, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 791, and amended Pub. L. 96-88, title III, § 301(a)(1), (2)(H), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

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## EFFECTIVE DATE

Section effective Oct. 1, 1977, except for subsecs. (a)(1)(D) and (b), which are effective Nov. 29, 1975, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commission" in text pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1412 to 1414 of this title.

§ 1418. Evaluation

(a) Duty of Secretary

The Secretary shall measure and evaluate the impact of the program authorized under this subchapter and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children.

(b) Studies and investigations

The Secretary shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this subchapter. In carrying out his responsibilities under this section, the Secretary shall—

(1) through the National Center for Education Statistics, provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this subchapter and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this subchapter, including—



(A) the number of handicapped children in each State, within each disability, who require special education and related services;

(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 1412(5)(B) and section 1414(a)(1)(C)(iv) of this title, and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular education environment;

(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are not receiving a free appropriate public education;

(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this chapter; and

(2) provide for the evaluation of programs and projects assisted under this subchapter through—

(A) the development of effective methods and procedures for evaluation;

## EFFECTIVE DATE

Section effective Oct. 1, 1977, except for subsecs. (a)(1)(D) and (b), which are effective Nov. 29, 1975, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commission" in text pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1412 to 1414 of this title.

§ 1418. Evaluation

(a) Duty of Secretary

The Secretary shall measure and evaluate the impact of the program authorized under this subchapter and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children.

(b) Studies and investigations

The Secretary shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this subchapter. In carrying out his responsibilities under this section, the Secretary shall—

(1) through the National Center for Education Statistics, provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this subchapter and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this subchapter, including—



(A) the number of handicapped children in each State, within each disability, who require special education and related services;

(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 1412(5)(B) and section 1414(a)(1)(C)(iv) of this title, and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular education environment;

(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are not receiving a free appropriate public education;

(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this chapter; and

(2) provide for the evaluation of programs and projects assisted under this subchapter through—

(A) the development of effective methods and procedures for evaluation;

(B) the testing and validation of such evaluation methods and procedures; and

(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

(c) Data sample

In developing and furnishing information under subclause (E) of clause (1) of subsection (b) of this section, the Secretary may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

(d) Annual reports to Congressional committees

(1) Not later than one hundred twenty days after the close of each fiscal year, the Secretary shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b) of this section.

(2) The Secretary shall include in each such report—

(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

(B) any recommendations for change in the provisions of this subchapter, or any other Federal law providing support for the education of handicapped children; and

(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 1411 of this title, including actions undertaken by the



Secretary to carry out provisions of this chapter relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Secretary shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

(e) Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

(Pub. L. 91-230, title VI, § 618, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 791, and amended Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## EFFECTIVE DATE

Section effective Oct. 1, 1977, except for subsec. (a), which is effective Nov. 29, 1975, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsecs. (a) to (d) pursuant to sections 310(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title which transferred all functions of the Commissioner of Education to the Secretary of Education.

## LIMITATION ON AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 1982 AND 1983

Pub. L. 97-35, title VI, § 602(a)(2), Aug. 13, 1981, 95 Stat. 483, provided that: "There is authorized to be appropriated to carry out section 618 of such Act [this section] $2,300,000 for each of the fiscal years 1982 and 1983."

(B) the testing and validation of such evaluation methods and procedures; and

(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

(c) Data sample

In developing and furnishing information under subclause (E) of clause (1) of subsection (b) of this section, the Secretary may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

(d) Annual reports to Congressional committees

(1) Not later than one hundred twenty days after the close of each fiscal year, the Secretary shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b) of this section.

(2) The Secretary shall include in each such report—

(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

(B) any recommendations for change in the provisions of this subchapter, or any other Federal law providing support for the education of handicapped children; and

(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 1411 of this title, including actions undertaken by the



Secretary to carry out provisions of this chapter relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Secretary shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

(e) Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

(Pub. L. 91-230, title VI, § 618, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 791, and amended Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## EFFECTIVE DATE

Section effective Oct. 1, 1977, except for subsec. (a), which is effective Nov. 29, 1975, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsecs. (a) to (d) pursuant to sections 310(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title which transferred all functions of the Commissioner of Education to the Secretary of Education.

## LIMITATION ON AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 1982 AND 1983

Pub. L. 97-35, title VI, § 602(a)(2), Aug. 13, 1981, 95 Stat. 483, provided that: "There is authorized to be appropriated to carry out section 618 of such Act [this section] $2,300,000 for each of the fiscal years 1982 and 1983."

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1413, 1417 of this title.

§ 1419. Incentive grants

(a) Authority to make grants

The Secretary shall make a grant to any State which—

(1) has met the eligibility requirements of section 1412 of this title;

(2) has a State plan approved under section 1413 of this title; and

(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 1411(a)(1)(A) of this title.

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each child in that State.

(b) Application

Each State which—

(1) has met the eligibility requirements of section 1412 of this title,

(2) has a State plan approved under section 1413 of this title, and

(3) desires to receive a grant under this section,

shall make an application to the Secretary at such time, in such manner, and containing or accompanied by such information, as the Secretary may reasonably require.

(c) Payment

The Secretary shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall



be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

(d) Ratable reduction or increase of payments

If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this subchapter for such fiscal year, the maximum amounts which all States may receive under this subchapter for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(e) Authorization of appropriations

In addition to the sums necessary to pay the entitlements under section 1411 of this title, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

(Pub. L. 91-230, title VI, § 619, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 793, and amended Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

## EFFECTIVE DATE

Section effective Oct. 1, 1977, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in subsecs. (a) to (c) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## LIMITATION ON AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 1982 AND 1983

Pub. L. 97-35, title VI, § 602(a)(3), Aug. 13, 1981, 95 Stat. 483, provided that: "There is authorized to be appropriated to carry out section 619 of such Act [this section] $25,000,000 for each of the fiscal years 1982 and 1983."

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1411 of this title.

### § 1420. Payments

(a) Payments to States; distribution by States to local educational agencies and intermediate educational units

The Secretary shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this subchapter. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this subchapter after the State educational agency has approved applications of such agencies or units for payments in accordance with section 1414(b) of this title.

(b) Advances, reimbursements, and installments

Payments under this subchapter may be made in advance or by way of reimbursement and in such installments as the Secretary may determine necessary.

(Pub. L. 91-230, title VI, § 620, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 793, and amended Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)



## EFFECTIVE DATE

Section effective Oct. 1, 1977, see section 8 of Pub. L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

## TRANSFER OF FUNCTIONS

"Secretary", meaning the Secretary of Education, was substituted for "Commissioner" in text pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1414 of this title.

# SUBCHAPTER III—CENTERS AND SERVICES TO MEET SPECIAL NEEDS OF THE HANDICAPPED

### § 1421. Regional resource centers

(a) Establishment; functions

The Secretary is authorized to make grants to or contracts with institutions of higher education, State educational agencies, or combinations of such agencies or institutions, which combinations may include one or more local educational agencies, within particular regions of the United States, to pay all or part of the cost of the establishment and operation of regional centers which will develop and apply the best methods of appraising the special educational needs of handicapped children referred to them and will provide other services to assist in meeting such needs. Centers established or operated under this section shall (1) provide testing and educational evaluation to determine the special educational needs of handicapped children referred to such centers, (2) develop educational programs to meet those needs, and (3) assist schools and other appropriate agencies, organizations and institutions in providing such educational programs

through services such as consultation (including, in appropriate cases, consultation with parents or teachers of handicapped children at such regional centers), periodic reexamination and reevaluation of special educational programs, and other technical services.

(b) Considerations governing approval of application

In determining whether to approve an application for a project under this section, the Secretary shall consider the need for such a center in the region to be served by the applicant and the capability of the applicant to develop and apply, with the assistance of funds under this section, new methods, techniques, devices, or facilities relating to educational evaluation or education of handicapped children.

(Pub. L. 91-230, title VI, § 621, Apr. 13, 1970, 84 Stat. 181; Pub. L. 96-88, title III, § 301(a)(l), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)



## APPENDIX D

34 C.F.R., Part 300.360
34 C.F.R., Part 300.530
34 C.F.R., Part 300.532

## DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

§ 300.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 300.220-300.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 300.182-300.186 do not apply to the State educational agency.

(Authority: 20 U.S.C. 1411(c)(4); 1413(b); 1414(d))

*Comment.* Section 300.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For Example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • • " Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

## PROTECTION IN EVALUATION PROCEDURES

§ 300.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.530-300.534.



(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(Authority: 20 U.S.C. 1412(5)(C))

§ 300.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing,

social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(Authority: 20 U.S.C. 1412(5)(C))

*Comment.* Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

# OPPOSITION

# BRIEF

Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT
OF PUBLIC INSTRUCTION,
*Petitioner,*

VS.

JOHN DOE and JACK SMITH,
*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

A. Whether the "stay put" provision of the Education For All Handicapped Children Act, Pub.L. 94-142, precludes a local school district from immediately changing the placement of a child whose handicap-related behavior endangers himself or others.

B. Whether the Education For All Handicapped Children Act, Pub.L. 94-142, requires an evaluation of a handicapped pupil's needs before a significant change can be made in that pupil's placement, program or services.

C. Whether the Education For All Handicapped Children Act, Pub.L. 94-142, requires the state to provide direct services to each individual handicapped child where a local school district is unable or unwilling to discharge its responsibilities to provide for the education of the child.

D. Whether under the circumstances it was an abuse of discretion for the district court to order the state to provide direct services in view of the systemwide and statewide violations of the Education For All Handicapped Children Act, Pub.L. 94-142, found below.

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*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

**RESPONDENTS' BRIEF IN OPPOSITION**

## OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 793 F.2d 1470 and is reproduced at Appendix A of the Petition. The decisions of the district court are unpublished but are reproduced as Appendix B to the Ninth Circuit's decision.

## STATUTES AND REGULATIONS INVOLVED

This case involves the Education For All Handicapped Children Act, Pub. L. 94-142, 20 U.S.C. Section 1401 et seq. (hereinafter "EHA"). Also involved are certain provisions of 34 C.F.R. Part 300. The relevant sections of Part 300 not contained in the Petition for Certiorari herein are reproduced at Appendix A.

## STATEMENT OF THE CASE

### A. Facts Surrounding Denial Of Educational Benefits To Plaintiffs.

Plaintiffs Doe and Smith are educationally handicapped children eligible for special education and related services pursuant to the EHA. Each engaged in misconduct that was a manifestation of his respective handicaps. At the time each filed suit, each was out of school indefinitely due to disciplinary action taken by the local school district and acquiesced in by the state authorities. To secure their rights under the EHA they filed suit against the San Francisco Unified School District ("SFUSD"), the California State Department of Education and local and state officials.

On November 6, 1980, while a student at a SFUSD school for special education students, Doe struck another student and broke a school window. He was suspended for five days by the school principal. The principal conferred with Doe and his mother and then recommended Doe to the Student Placement Committee ("SPC") for expulsion and/or exclusion. The committee continued Doe's suspension indefinitely. Doe's mother was granted a conference with the committee after it made its recommendation but received no procedural rights or notices pursuant to the EHA.

Doe, through counsel, objected to the procedures employed against him on the ground, *inter alia*, that they violated the EHA. The SFUSD ignored the request that the expulsion hearing be canceled and an IEP team be convened. Doe then sought relief in the district court by restraining order and preliminary injunction.

The district court issued a temporary restraining order directing the SFUSD to cancel the expulsion proceedings. Later the court issued a preliminary injunction enjoining the SFUSD from excluding Doe from school while placement pursuant to an IEP was effected.

Plaintiff Smith was involved in a number of incidents of misbehavior after which the SFUSD unilaterally reduced his program to a half-day schedule. His grandparents later agreed to the class reductions, but they were never apprised of their right to challenge the reductions or any of the other procedural safeguards mandated by the EHA.



Smith later made comments of a sexual nature to a female student and stole some pencils. He was suspended for five days and he too was recommended by the SPC for expulsion and/or exclusion. His suspension was also continued pending the projected expulsion proceedings.

Upon objection, through counsel, the expulsion/exclusion hearing was canceled. The SPC offered to restore Smith to his half-day placement or provide him with home tutoring while alternative placement was being pursued. Because the SFUSD refused to allow Smith to return to full placement, his grandparents chose home tutoring. Smith then moved to intervene in the suit brought by Doe.

### B. The District Court Opinions.

On October 24, 1983 the district court issued a declaration and permanent injunction with respect to the local school district defendants. On April 23, 1984 the district court also issued a decision granting declaratory and injunctive relief against the state defendants. The district court outlined the duties of the state Superintendent of Public Instruction with respect to the discipline of handicapped children. The court ruled *inter alia* that:

> 1. Where misconduct by a handicapped child is a manifestation of his handicaps he cannot be disciplined beyond the statutorily authorized suspension, expelled or totally deprived of educational services;
>
> 2. Before any significant changes are made in a child's educational placement or program or the services provided to him, the child shall have the right to a "comprehensive evaluation";
>
> 3. Whenever a change of placement or program is recommended as a result of a child's misconduct, the child shall have a right to have a multidisciplinary team convened within five school days of the initiation of disciplinary action;

4. The child has the right to remain in his current placement pending all EHA procedures, including all administrative and judicial reviews;

5. A handicapped child who misbehaves may be suspended for no more than five consecutive days;

6. Decisions of the IEP team shall be reached by a majority decision;

7. The state must provide services directly when in any individual case a local educational agency is unable or unwilling to establish and maintain such programs or services.

### C. The Ninth Circuit Opinion.

The local school district appealed from the December 2, 1983 declaratory judgment and injunction against it. The state defendant, petitioner here, appealed from the April 23, 1984 judgment and injunction, and the plaintiffs filed a cross appeal from a district court order of May 24, 1984. The appeals were consolidated in the Ninth Circuit.

The Ninth Circuit agreed with the district court and affirmed the lower court's ruling that the EHA prohibits expulsion of handicapped children for misbehavior that is a manifestation of their handicaps. The court disagreed somewhat on certain other points. It held, based upon a change in the California statutes enacted shortly before the Ninth Circuit decision, that a handicapped child may, in some circumstances, be suspended for periods of more than five days, and that decisions of the IEP team do not have to be by a majority, but rather by a "consensus."

The Ninth Circuit upheld the district court ruling that a comprehensive evaluation must be made before a significant change is made in the handicapped child's placement, program or services. It also held that a child must be maintained in his or her current placement pending the resolution of review proceedings.



## REASONS FOR DENYING THE WRIT

### A. The Cases Cited By Petitioner Do Not Create A True Conflict.

Every court, including the Ninth Circuit below, addressing the question of the disciplinary procedures to be used regarding handicapped students has held that the EHA and its procedural protections apply. The seminal appellate decision is *S-1* v. *Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981). All of the subsequent cases purport to follow the holding and analysis of *S-1*. Petitioner here has taken one footnote out of *S-1* and exaggerated the holding of the Ninth Circuit below in an attempt to manufacture the appearance of a conflict among the circuits. As shown below, there is no conflict. Moreover, the issue on which a conflict is claimed was neither presented by the facts of this case, nor briefed, nor decided below.

The petitioner cites *Doe* v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983), *Jackson* v. *Franklin County School Board*, 765 F.2d 535 (5th Cir. 1985) and *Victoria L.* v. *District School Board*, 741 F.2d 369 (11th Cir. 1984) as conflicting with the Ninth Circuit's holding. When closely read, none of these decisions truly conflict with the Ninth Circuit's holding.

#### 1. Petitioner's First "Question Presented" Was Neither Raised nor Decided Below.

The state's first question—whether the "stay put" provision of the EHA should operate to preclude a school district from changing a handicapped student's placement when the student may act dangerously—is an issue not raised nor determined in the courts below. Nowhere in the statements of issues below was there any mention of any exception to the application of Section 1415(e)(3). (See [State Superintendent of Public Instruction] Appellant's Brief, dated December 6, 1984, page 1, "Issues Presented.") Indeed, Petitioner declared that where the district court's injunction set forth the "stay put" procedures, "Such requirements are already in the statute, 20 U.S.C. § 1415(e)(3), and we have no quarrel with them." Appellant's Brief, *supra*, at p. 16. In sum, the "stay put" provision of the EHA was never challenged in the district court or in the Court of Appeals.

Actually, the state defendants originally misconstrued the district court's application of § 1415(e)(3) to prohibit even statutorily authorized 5-day suspensions (see Appellant's Brief, *supra*, at p. 16), yet the district court's injunction clearly addresses only disciplinary actions taken in *excess* of 5-day suspensions (see, for example, Order and Permanent Injunction, April 23, 1984, Appendix B, p. A-56, paragraph 3). The Ninth Circuit recognized that the district court injunction does not conflict with either § 1415(e)(3) or the school's power to suspend for up to 5 days. 793 F.2d at 1485 ("As should be clear, we believe this conflict does not exist."). The Ninth Circuit held that such suspensions do not amount to changes in placement within the meaning of the EHA. *Id.*

The language of the section is mandatory. The sort of unbridled discretion which the petitioners seek would allow school districts to change a student's placement or remove him or her from school indefinitely "whether the child is handicapped or not or whether his conduct is a manifestation of his handicap," whether the conduct is only threatened, or likely to reoccur, or whenever the school district thinks prudent. The exception sought by the state defendants in this case would override entirely the Congressional purpose behind the EHA: to guarantee an education to handicapped students regardless of the nature or severity of their handicaps.

**2. The Decisions of the First and Ninth Circuits Are Consistent.**

The petitioner has stripped one sentence out of the Ninth Circuit opinion in an attempt to create a conflict with the First Circuit where no conflict exists. The First Circuit case, *Doe* v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983), examined the "stay put" provision in § 1415(e)(3) and ruled as follows:

> We hold that in view of congressional preference for maintenance of the current educational placement, a party that seeks to modify an existing educational placement, program or services must proceed by a motion for preliminary injunction . . . . We caution, however, that this is a matter of *extraordinary* relief. (Emphasis in original) *Id.* at p. 919.



Although the Ninth Circuit begins its discussion of the "stay put" provision by noting there are no exceptions to the "automatic injunction" of § 1415(e)(3) (793 F.2d at 1486), the court continues on to state that limiting educators' ability to unilaterally change the placement of a child who threatens to disrupt the educational process does not leave educators helpless.

> "They have recourse to the gamut of lesser disciplinary measures and program variations that do not rise to the level of changes in placement. *Moreover, educational agencies may seek judicial relief should existing procedures prove inadequate to cope with truly exigent circumstances.*" *Id.* (Emphasis added.)

Clearly, the Ninth Circuit and the First Circuit have issued identical rulings: a child's current placement must be maintained pending administrative and judicial proceedings but judicial relief, *i.e.*, preliminary injunction, is available to change the placement in extraordinary circumstances.

**3. The Decisions of the Fifth and Eleventh Circuits Are Distinguishable.**

*S-1* v. *Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981), is the seminal appellate case recognizing that the Education For All Handicapped Children Act, Pub.L. 94-142, 20 U.S.C. Section 1401 et seq. procedures govern discipline of handicapped students. After finding that the EHA procedures were triggered by expulsions, the court made the statement—erroneously relied upon by the petitioners—that the "stay put" provision of 20 U.S.C. § 1415(e)(3) did not strip local school boards of their "authority and responsibility to ensure a safe school environment." *S-1* v. *Turlington*, *supra*, 635 F.2d at 348 n.9. The *S-1* court explained, quoting 45 C.F.R. § 121(a).513 [now 34 C.F.R. § 300.513] (comment), that "[w]hile the placement may not be changed, this does not preclude dealing with children who are endangering themselves or others." 635 F.2d at 348 n.9.

The Ninth Circuit agreed that local school boards could exercise "residual" disciplinary authority, citing the amended version of the regulation cited in *S-1* by the Fifth Circuit, 34 C.F.R. § 300.513 (1985), which states:

> *While the placement may not be changed*, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others. 793 F.2d at 1486. (Emphasis added.)

In the present case the Ninth Circuit focuses on the requirement of the federal law that while the placement may not be changed absent EHA procedures, the school district may utilize its normal procedures for dealing with acting out children, including imposition of a "fixed-term suspension," and the entire "gamut of lesser disciplinary measures and program variations that do not rise to the level of changes of placement." *Id.* The Ninth Circuit thus prohibited only a unilateral determination by school officials that a child be suspended indefinitely until the EHA-mandated procedures are completed. Neither *Jackson* nor *Victoria L.* involved disciplinary explusion. *S-1* recognized expulsion as a change in placement which invokes the procedural requirements of the EHA, *S-1* v. *Turlington*, *supra* at 348. See also *Kaelin* v. *Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982) (same); *Doe* v. *Koger*, 480 F.Supp. 225 (N.D. Ind. 1979) (same).

*Jackson* v. *Franklin County School Board*, 765 F.2d 535 (5th Cir. 1985), is factually quite different from the instant case, because within days of Jackson's suspension he was committed for evaluation to a state hospital by the juvenile court. The semester following his release from the hospital, Jackson reapplied for school. Rejecting the IEP proposed, Jackson filed for a due process hearing and asserted that he had a right to remain in his prior public school placement. Thus, in *Jackson* it was the intervention of the Juvenile Court, and not that of the school district, which changed Jackson's placement. Moreover, when the district finally conducted an IEP for Jackson, it offered him a series of alternative educational programs and placements. In the present case, there was no judicial intervention in Doe's placement, nor was an IEP conducted or alternatives suggested until so ordered by the district court. The *Jackson* court observes that



"schools have *discretion to alter* a handicapped student's placement when he endangers himself or others and threatens to disrupt a safe school environment," *Jackson*, *supra*, at 538 (emphasis added), something quite different from indefinitely suspending or expelling the student entirely. Similarly, the passage in *S-1* v. *Turlington*, *supra*, relied upon by both the *Jackson* and the *Victoria L.* courts, provides only that:

> [T]he local school board retains the authority to remove a handicapped child *from a particular setting* upon a proper finding that the child is endangering himself or others. *S-1* v. *Turlington*, *supra*, 635 F.2d at 348, n. 9. (Emphasis added.)

*Victoria L.* v. *District School Board*, 741 F.2d 369 (11th Cir. 1984), also involved not an expulsion, but a transfer to an Alternative Learning Center with which the student disagreed (and about which a due process hearing had been held). Citing *S-1* v. *Turlington*'s footnote 9 again, the Eleventh Circuit Court found that the "defendants properly exercised the traditional disciplinary authority that they retained under the EHA," *Victoria L.*, *supra*, 741 F.2d at 374. This is not different than saying, as the Ninth Circuit has, that school authorities may exercise their "residual disciplinary authority" to secure a safe school environment while the due process provisions of the EHA for a change of placement are pursued. *Doe* v. *Maher*, *supra*, 793 F.2d at 1486.

Upon close examination it is clear that *Jackson* and *Victoria L.* do not present a "head-on collision" on a narrow issue with the Ninth Circuit's holding that would justify this Court's review. Roehrer, E. T. and Roehrer, S. M., "Certiorari—What Is A Conflict Between Circuits?" 20 U.of Chi.L.Rev. 656 (1956).

The Ninth Circuit in fact did not leave school authorities powerless; as discussed above, the court here (as well as in similar cases) allows that "lesser measures" of discipline remain available, and that in extraordinary circumstances the agencies may seek judicial relief (exactly the relief directed by *Doe* v. *Brookline School Committee*, *supra*). In sum, there is no conflict as alleged by Petitioner, and the Ninth Circuit decision does not prevent all disciplinary measures.

**B. Allowing Petitioner To Evade The "Stay-Put" Provisions Would Have Disastrous Consequences.**

Petitioner contends that the holding below would have disastrous results. Petition, pp. 7-10. In fact, adopting Petitioner's position would lead to the disastrous result, contrary to the Congressional directive in the EHA, of excluding millions of handicapped children from any educational benefits at all. In seeking to override the EHA, Petitioner's argument is more properly directed at Congress.

In effect Petitioner wants school authorities to be free of the strictures of the EHA altogether with regard to discipline. Petitioner wants to allow the exclusion, whether indefinite or permanent, of handicapped children from any education. This hostility to educating seriously emotionally disturbed children is not new. In fact this hostility was well known to Congress and prompted in part the passage of the EHA. The Congressional fact findings explicitly acknowledge the problem:

> The Congress finds that . . . (4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers. 20 U.S.C. § 1400(b)(4)(1985).

It defined "handicapped children" to include those who are "seriously emotionally disturbed." 20 U.S.C. § 1401(1)(1985). Congress knew full well that such children act out in school and are difficult. Yet Congress included them in the EHA. To authorize exceptions not articulated in the EHA so as to give school officials a "free hand" to exclude seriously emotionally disturbed children contradicts the purpose of the EHA "to assure that *all* handicapped children have available to them . . . a free appropriate public education . . . ." 20 U.S.C. § 1400(c) (1985).

Indeed this very case was brought because the SFUSD routinely expelled/excluded seriously emotionally disturbed children for behavior which was a manifestation of their handicapping condition. Such children were then ineligible for any public educational benefits, whether in a special education setting or in a regular public school. The parties here stipulated that the conduct



of Doe and Smith was behavior that was a manifestation of their respective handicaps. The injunction of the district court, affirmed by the Ninth Circuit, put an end to the above-described practice which undermined the EHA and evaded the obligations of school officials under the EHA.

The Ninth Circuit's decision does not tie the hands of school officials. It merely requires that they not deny handicapped children education indefinitely during the pendency of disciplinary proceedings or exclude them totally for behavior which is a manifestation of their handicapping condition. Disaster will not result from the Ninth Circuit's ruling. Instead disaster will occur if seriously emotionally handicapped children, who are least well equipped to overcome large gaps in their schooling, are denied educational benefits indefinitely during the pendency of EHA procedures or as a result of behavior that is a manifestation of their handicap.

**C. Evaluation Prior To Any Significant Change Of Program Or Services Effectuates The Goals Set By Congress.**

Congress enacted the Education For All Handicapped Children Act based upon a finding that the special education needs of more than eight million handicapped children were not being met. The purpose of this act is:

> [T]o assure that all handicapped children have available to them, within the time period specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children. 20 U.S.C. § 1400(c), Pub.L. 94-142, Nov. 29, 1975.

The EHA and its regulations require that an evaluation must be made upon initial placement and again "if conditions warrant." 34 C.F.R. § 300.534(b); 20 U.S.C. § 1412(5)(c); *see generally* 34 C.F.R. § 104.35 (1985). On appeal Petitioner conceded that

an educational agency is required to conduct an evaluation before taking any action with respect to any significant change in placement. Petitioner's challenge on appeal was to the requirement for evaluation prior to making significant changes in program or services. The Ninth Circuit cited an EHA regulation, 34 C.F.R. § 300.551 (1985), to support its conclusion that an evaluation *is* required before making any significant changes in a handicapped child's education. Significant changes in placement, program or services are only contemplated where the child's condition or situation has changed to such an extent that the current educational program or services may no longer be appropriate. In such a situation the conditions clearly warrant reevaluation of the child to determine what has changed and how to best address the student's needs. Petitioner pretends that the Ninth Circuit and the EHA require evaluations when a child is told to sit at another desk or is given a new set of textbooks. Neither Congress nor the court require evaluations before effecting minor changes in program or services. Petitioner's contention is not only wrong but it also does not raise an important issue of statutory interpretation justifying certiorari.

**D. The Ninth Circuit's Holding That A State Must Provide Direct Services Where A Local School District Is Unwilling To Provide Educational Services Reflects Congressional Intent And Is A Permissible Equitable Remedy For The Violations Here.**

Section 1414(d) of the EHA provides:

> Whenever a state educational agency determines that a local educational agency—
>
> (1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;
>
> (2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or



> (3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;
>
> the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency.

Petitioner argues the Ninth Circuit's holding regarding this section of the EHA places an intolerable burden, not contemplated by Congress, on the states. Petitioner is wrong. The states' responsibilities are detailed in the EHA as passed by Congress. Congress enacted the EHA as a means of insuring that educational opportunities are made available to *all* handicapped children. Federal funding is provided to those states willing to accept responsibility for implementing EHA programs. The EHA legislative history explicitly states that the state educational agency, here the California Department of Education headed by Petitioner, bears ultimate responsibility for the education of each individual handicapped child:

*State Educational Agency*

> The Committee bill requires that the State educational agency be responsible for insuring that all requirements of the Act are carried out . . . . This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency . . . .
>
> The Committee considers the establishment of single agency responsibility for assuring the right to education of all handicapped children of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of

> services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. S. Rep. No. 94-168 94th Cong., 1st Sess. 24, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1448.

The states should be well aware of their duties to insure that local school districts provide adequate educational services, to compel local compliance with the federal requirements, or to provide those services itself when necessary. These obligations were imposed as a condition to receiving federal funds. They were imposed by Congress, not by the Ninth Circuit. The Ninth Circuit has merely recognized that California's responsibilities under the Act are not as limited as Petitioner would read them.

Petitioner argues that the ability to demand services directly from the state educational agency will allow handicapped students to circumvent the administrative and judicial remedies required by the EHA. To the contrary, ultimate responsibility in the state agency for provision of services simply insures, as Congress intended, that handicapped children not fall in a "No Man's Land" between state and local agencies each disclaiming responsibility.

Moreover, the remedy of state responsibility here came as a result of a clear system-wide and statewide violation of the EHA. When this suit began, neither the SFUSD nor the State of California had any policy or program for the application of the EHA to student discipline. Students such as Doe were routinely expelled from school for behavior that was a manifestation of their handicaps, and thus unlawfully denied all educational benefits. It was in the context of this system-wide and statewide failure of responsibility that the district court ordered the state to adopt a policy and program, the school district to adopt and implement them at the local level, and the state to provide the "backstop" of direct provision of educational services if, despite the state and local pronouncements, a handicapped child was denied educational benefits in violation of the EHA. Even were the State



Department of Education's direct provision of services not contemplated by the EHA, such injunctive relief would be well within the district court's discretion given the statutory violations found in this case. *Hills* v. *Gautreaux*, 425 U.S. 284, 293-94 (1976) (scope of remedy should fit "nature and extent" of the violation); *Ephraim Freightways, Inc.* v. *Red Ball Motor Freight, Inc.*, 376 F.2d 40, 41 (10th Cir. 1967), *cert. denied*, 389 U.S. 829 (1967) ("Equitable injunction includes the power to provide complete relief in light of the statutory purpose.") *E.g.*, *United States* v. *Loew's, Inc.*, 371 U.S. 38, 53 (1962) (injunction of violations of Sherman & Clayton Acts can impose obligations not otherwise required under those acts). Under the circumstances, review by certiorari of the discretionary relief granted in the decrees below would serve no general unifying purpose and is unworthy of this Court's effort. *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow").

## CONCLUSION

There is no conflict among the Circuits justifying Supreme Court resolution. The substantive arguments raised by petitioner are clearly rebutted by the EHA and its legislative history. They raise neither important statutory questions nor errors of law that would justify this Court's attention. For these reasons, the petition for a writ of certiorari should be denied.

DATED: December 4, 1986.

Respectfully submitted,

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* Counsel gratefully acknowledge the substantial assistance of Lori Green in the research and preparation of this brief.

# APPENDIX A

## 20 U.S.C. § 1400

### § 1400. Congressional statements and declarations

(a) *Short title*

This chapter may be cited as the "Education of the Handicapped Act."

(b) *Findings*

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective

special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) *Purpose*

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

(Pub.L. 91-230, Title VI, § 601, Apr. 13, 1970, 84 Stat. 175, amended Pub.L. 94-142, § 3(a), Nov. 29, 1975, 89 Stat. 774.)



## APPENDIX B

34 C.F.R. Section 104.35
34 C.F.R. Section 300.513
34 C.F.R. Section 300.534

### § 104.35. Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

**§ 300.513. Child's status during proceedings.**

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(Authority: 20 U.S.C. 1415(e)(3))

*Comment.* Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.



**§ 300.534. Reevaluation.**

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 300.340-300.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(Authority: 20 U.S.C. 1412(5)(c))

# PETITIONER'S

# BRIEF

Supreme Court, U.S.
FILED
APR 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT,
OF PUBLIC INSTRUCTION,
*Petitioner,*

VS.

JOHN DOE AND JACK SMITH,
*Respondents.*

**On Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Whether the "stay put" provision of the Education for All Handicapped Children Act, Pub.L. 94-142, precludes a local school district from immediately changing the placement of a child whose handicap-related behavior endangers himself or others.

2. Whether the state must provide direct services to each individual handicapped child with respect to whom the local school district has faltered in the discharge of its responsibilities.

## PARTIES

The original plaintiff in the case was a handicapped student, John Doe. Jack Smith, also a handicapped student, later intervened as a plaintiff. The defendants were Wilson Riles, former California Superindentent of Public Instruction, Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as members of the San Francisco Unified School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, individually and in his capacity as chairperson of the Student Placement Committee of the San Francisco Unified School District, and Henry Caruso, individually and in his capacity as principal of the Louise Lombard School in the San Francisco Unified School District.

The petitioner before this Court is Bill Honig, successor to Wilson Riles. See Supreme Court Rules, rule 40.3. The local school district defendants are not a party to the proceedings in this court.

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**On Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR PETITIONER

## OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 793 F.2d 1470 and is reproduced as Appendix A to the Petition for Certiorari.[1] The decisions of the district court are unpublished. The district court decision which concerns us here is reproduced as Appendix B to the petition. Other decisions and orders of the district court appear in the Joint Appendix.

## JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 11, 1986, affirming in part, reversing in part, and modifying in part the judgments of the United States District Court for the Northern District of California dated December 2, 1983, April 23, 1984 and May 24, 1984. On September 18, 1986

[1] References to the opinion will be preceded by an "A" designation.

Mr. Chief Justice Rehnquist signed an order extending the time for filing the petition for certiorari until November 8, 1986. The petition for certiorari was filed in this court on October 31, 1986. Certiorari was granted on February 23, 1987. This court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

## STATEMENT

This case involves complaints by John Doe (J.A. 1, 67) and plaintiff-intervenor Jack Smith (J.A. 91), two special education students, against the State Superintendent of Public Instruction and the San Francisco Unified School District for alleged violations of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (hereafter referred to as the EHA).

Plaintiff John Doe, a minor with severe emotional problems, was discharged from a state mental hospital in the Spring of 1980. (J.A. 22, 71, 199.) In April the school district designed an individualized education program (IEP) for him for the upcoming school year. (J.A. 15.) Following his enrollment in a school operated by the district, Doe had at least two violent outbursts. On November 6, 1980, he strangled a student so severely as to cause abrasions on the child's neck. While being escorted to the principal's office he kicked out a plate glass window. (J.A. 209.)[2] It was undisputed that Doe's conduct arose out of his handicap. The principal immediately suspended Doe for five days and recommended that he be excluded from school. (J.A. 20.)

The suspension was extended pending a hearing before the Student Placement Committee. Before the hearing could take place, Doe filed a lawsuit seeking his return to school. The district court ruled in his favor and he returned to school on December 15, 1980. During the suspension, the school district gave Doe home instruction to help him continue his academic program. (J.A. 209.)

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[2] The facts of the incident are described with particularity in a memorandum written by the school principal shortly after the event. See Exhibit D to School District's Points and Authorities, Dkt. # 123.



The district court's December 12, 1980 injunction against the school district (J.A. 63) ordered that Doe remain at school until the parties agreed on an interim or permanent placement. To ensure the safety of other students, the district assigned a full-time aide to Doe.

Plaintiff Jack Smith alleged statutory and constitutional violations based on his suspension from school in November 1980. Smith was suspended following incidents of antisocial conduct which included repeated theft, extortion, pulling a fire alarm, stealing, disruptiveness and sexual remarks to and grabbing of female students. (J.A. 211, 213.) The suspension followed a series of efforts by school personnel, in cooperation with Smith's grandparents, to deal with Smith's behavior problems in the school setting. These efforts included putting Smith on a part-day program, with the consent of his grandparents and in full compliance with his existing IEP. (J.A. 212.)

Smith was never expelled or excluded nor was he the subject of any administrative proceeding. His guardians consented to temporary home instruction. Eventually his guardians agreed to placement in a private school which the district recommended. (J.A. 212.) Smith was in attendance at that school during the trial before the district court.

On December 2, 1983, the district court issued an injunction with respect to the San Francisco Unified School District.[3] Earlier, on June 17, 1983, the Court had ruled that the school district defendants had violated plaintiffs' rights under the EHA, section 504 of the Rehabilitation Act and 42 U.S.C. section 1983. (J.A. 217.) The permanent injunction set forth specific guidelines for the district to follow in dealing with misbehavior arising from a student's handicap.

On April 23, 1984, the district court also granted plaintiffs declaratory and injunctive relief against the state defendant. (J.A. 251.) The state defendant appealed to the Ninth Circuit Court of Appeals on May 17, 1984. (J.A. 252.) On July 11, 1986, the

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[3] This judgment was subsequently modified following the Ninth Circuit's decision. The modified order appears at J.A. 236.

circuit court affirmed the district court in part, modified in part and reversed in part. 793 F.2d 1470. The court of appeals ruled, *inter alia*, that the "stay put" provision of the EHA, 20 U.S.C. Section 1415(e)(3), automatically enjoins a local educational agency from changing the placement of a disruptive handicapped pupil who has initiated due process proceedings pursuant to 20 U.S.C. Section 1415. (A. 19-21.)

The court of appeals also held that 20 U.S.C. section 1414(d) requires the state educational agency to provide direct services to an individual pupil whenever a local educational agency "refuses or wrongfully neglects to provide [a pupil] with a free appropriate education." (A. 31-32.) This Court granted certiorari to examine the foregoing rulings against the state defendant. The local school district is not a party to this proceeding.

## SUMMARY OF ARGUMENT

The Ninth Circuit holds that under the "stay put" provision of the EHA a handicapped child may be suspended for disruptive conduct but thereafter must be returned to his current placement pending review proceedings. This result makes no sense. It would be contrary to the interest of the disruptive child as well as the interests of the other children in the classroom. It could not have been what Congress intended.

The Ninth Circuit also held that where a local school district fails to act appropriately with respect to any individual child receiving services under the Act, the state must provide services to that child. Again, this is not what Congress intended. Direct services by the state are to be provided only when a district fails to have a program of special education for the children within its jurisdiction. Where a school district errs in an individual case, the EHA provides various remedies but these do not include the provision of direct services by the state.



## ARGUMENT

### I

### THE STAY PUT PROVISION SHOULD NOT APPLY TO CASES INVOLVING DISRUPTIVE CHILDREN

#### A. Applying the Stay Put Provision Here Would Be Bad Policy

In analyzing the problem at hand we will, of course, refer to the pertinent case law and statutory provisions. But we believe that the most powerful support for our position is basic common sense. Put simply, it makes no sense to believe Congress intended that a school district be compelled to return a violent and disruptive child to a classroom while lengthy review proceedings are taking place.

The so-called "stay put" provision of the EHA, section 1415(e)(3), reads as follows:

> "(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed."

The Ninth Circuit said, "... section 1415(e)(3) does not list any exceptions to its automatic injunction." (A. 21.)[4]

The Ninth Circuit's inflexible rule could have appalling consequences. What if a child brings a gun to school? What if he uses a baseball bat to maim a classmate?[5] Under the Ninth Circuit's

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[4] Technically, this statement is wrong. The section does provide for an exception where the parents and the educational agency agree that the child should not return to his current placement.

[5] The cases reflect a variety of disruptive situations. In the instant case, Doe choked another student and broke a plate glass window. Intervenor Smith was guilty of theft, extortion, and sexual advances to other children. See also *Jackson v. Franklin County School Board* (5th

decision the offending child could be suspended for 20 days (A. 18) but if he invokes EHA review procedures school authorities have no choice; they must return him to the classroom after his short suspension.[6]

This result defies common sense and Congress could not have intended it. When the disruptive child returns to the classroom he constitutes a menace to the safety of other children, school personnel, and school property.[7] Parenthetically, we are not talking about handicapped children whose behavior is only mildly disruptive or who are physically immature and easily controlled. In many cases these youngsters are husky, strong teenagers capable of overpowering teachers and inflicting life-threatening

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Cir. 1985) 765 F.2d 535 (17-year-old boy unbuttoned female student's blouse and touched her breasts); *Victoria L. v. District School Board* (11th Cir. 1984) 741 F.2d 369 (student brought razor blade and martial arts weapon to school and threatened to kill other students); *Cain v. Yukon Public School* (10th Cir. 1985) 775 F.2d 15 (teacher "could no longer handle" 18-year-old who had repeated outbursts); *Kaelin v. Grubbs* (6th Cir. 1982) 682 F.2d 595 (15-year-old assaulted teacher); *S-1 v. Turlington* (5th Cir. 1981) 635 F.2d 342 (students' misconduct consisted of masturbation, sexual acts against fellow students, vandalism, and profane language).

[6] In fairness, the Ninth Circuit was aware that emergency situations might arise. But its opaque suggestion as to how to deal with such situations is unhelpful. It said that in "truly exigent circumstances" educational agencies could seek judicial relief. (A. 21.) However, if the student must "stay put" the district court's options are limited. Moreover, requiring school authorities to have their counsel draw up legal papers, including pleadings, declarations, and the like, and to obtain a hearing in district court is hardly geared to dealing with situations where a suspension may expire and the safety of other children may thereafter be imperiled on a daily basis.

[7] Returning the disruptive child to the classroom might also expose school authorities to tort liability in the event teachers or other children are harmed by that child. See generally, "Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Caused By Acts of Fellow Students", 36 A.L.R.3d 330. Whether the stay put provision provides immunity from such liability is problematical.



injuries on fellow students.[8] Often they will act without provocation and with wild explosiveness.[9] Their mere presence in the classroom after such outbursts creates an unstable educational atmosphere characterized by fear and anxiety.[10]

Let us then examine the purpose of the stay put provision. Congress has given us no direct guidance on the subject.[11] As one court put it, "Section 615(e)(3) has little specific legislative history of its own." *Stemple v. Board of Ed. of Prince George's County* (4th Cir. 1980) 623 F.2d 893, cert. den. 450 U.S. 911 (1981). Nevertheless, the history does instruct us on some of Congress' more general concerns. For example, Congress included parents in planning conferences so that "services to the child are not arbitrarily curtailed or modified." U.S. Code Cong. and Admin. News, 94th Cong., 1st Sess., p. 1435 (1975). Congress was also concerned about "the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *Burlington School Committee v. Dept. of Educ.* (1985) ___ U.S. ___, 105 S.Ct. 1996, 85 L.Ed.2d 385. To minimize such practices Congress made clear that it had a strong preference for educating handicapped children with non-handicapped children, a so-called "mainstreaming" approach. 20 U.S.C. § 1412(5)(B). Congress realized, however,

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[8] At the time of his outbursts, plaintiff Doe was 17 years old, stood six feet tall, and weighed 195 pounds. (J.A. 16.)

[9] The IEP team reported that Doe "tolerates frustration up to a point and then explodes." (J.A. 16-17.)

[10] Educators are trying valiantly to cope with the problems generated by disruptive children. See *Resource Manual: Constructive Discipline*, published by L.A. County Superintendent of Schools, 1983; Sulzer-Azaroff & Mayer: *Applying Behavior Analysis Procedures With Children & Youth*, Holt, Rinehart & Winston, 1977; Sulzer-Azaroff & Mayer: *Achieving Educational Excellence*, Holt, Rinehart & Winston, 1986.

[11] The sole specific language addressing this provision is a descriptive portion of the joint explanatory statement of the Committee of Conference. See U.S. Code Cong. and Admin. News, 94th Cong. 1st Sess., p. 1503 (1975).

that there would be situations where mainstreaming would benefit neither the handicapped child nor his classmates. Accordingly, section 1412(5)(B) requires that the state's procedures "assure that, *to the maximum extent appropriate*, handicapped children . . . are educated with children who are not handicapped."[12] (Emphasis added.)

While mainstreaming is to be encouraged "the Act's use of the word 'appropriate' thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children." *Hendrick Hudson Dist. Bd. v. Rowley* (1982) 458 U.S. 176, 198. In our judgment, this statement applies particularly to handicapped children who are disruptive.

In the *Burlington* case a parent of a handicapped child disagreed with an individualized educational program (IEP) which had been designed by the school. The parent withdrew his child from the school and enrolled him in a different special school. When the parents sought reimbursement for the costs associated with the new school, the educational authorities refused to pay on the ground that when the parents withdrew their child from the first school they violated the stay put provisions of the EHA. It was pointed out by then Justice Rehnquist that the parents faced a difficult choice: If they went along with the possibly inappropriate IEP their child might suffer an educational detriment. If on the other hand they took him out of school and placed him elsewhere they risked no reimbursement. 85 L.Ed.2d at 395.

The parents in *Burlington* were faced with a potentially no-win choice. While that situation is not present here this court should rule, as it did in *Burlington*, that the stay put provision is inapplicable. Let us first look at the interest of the disruptive child in remaining in the regular classroom. We have previously observed that Congress expressed a preference for mainstreaming

[12] The disruptive child exception to the stay put provision should apply not only to mainstream classes but to any other placement where a disruptive child interacts with other children. After all, when the child has an outburst which affects other students he does not differentiate between handicapped and non-handicapped classmates.



handicapped children. It would seem, however, that a disruptive child derives only a marginal benefit from forced attendance in a regular classroom. This view finds support in comments made by HEW in conjunction with regulations enacted pursuant to the mainstream statute. At 34 Code of Federal Regulations section 300.552, HEW adopted the following comments which related to regulations involving the Rehabilitation Act:

> ". . . It should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs."

In other words, when such a child is removed from his current placement for disruptive conduct he is not being punished or exiled to a dystopian placement devoid of educational services. His behavior in the current setting signals that the placement is not appropriate for him. We recognize that outbursts by a handicapped child may be organically derived, may perhaps be the product of some type of synaptic malfunction. On the other hand, it is also likely that the child's interaction with other children precipitates or at least contributes to his outbursts. In any event, the fact that the misbehavior is not truly volitional makes no difference. Whatever the root cause of the disruptive conduct, the child is likely to derive greater benefit from being placed in an environment where he can profit from closer supervision and the services of trained personnel. Cf. *Roncker v. Walter* (6th Cir. 1983) 700 F.2d 1058, 1063; cert. den. 464 U.S. 864 (1983).[13]

[13] If school authorities are compelled to return the child to the classroom it could mean he will be there for the duration of his education, at least through high school. In *Burlington*, the review proceedings lasted some eight years and the court noted that "the review process is ponderous." 85 L.Ed.2d at 395. Here the proceedings have been going on for about six years.

For a sometimes dense but informative discussion of the review procedures see Neal and Kirp, "The Allure of Legalization Reconsid-

We recognize that in other types of cases withdrawing a handicapped child from the regular classroom might well deprive that child of an important educational benefit. For example, where a child's academic performance lags badly behind his peers, school authorities may conclude the child is retarded while his parents may insist the problem is merely neurological. Cf. *Wexler v. Westfield Bd of Ed.* (10th Cir. 1986) 784 F.2d 176. Barring that child from the classroom pending resolution of the dispute might inflict on him a setback from which he might never recover. If he is eventually placed back in the classroom he might never catch up with his peers. In that type of case the stay put requirement would obviously serve a constructive purpose.

That is far different from the case of the disruptive child where there are no subtle diagnostic distinctions to be made. The misbehavior of that child is open and notorious. When petitioner Doe in this case choked another student and broke a window it was stunningly apparent he was functioning poorly in the classroom, that his placement was inappropriate.

We must also consider the interests of the non-handicapped children in the classroom. When Doe had his outburst the education of his classmates was disrupted. The disruptive student prevents his classmates from getting an education. He is a looming distraction. He intimidates and instills fear. While his conduct may not be the product of a normal cognitive process, he nevertheless chills the educational atmosphere. The adverse effect he has on other children is wholly disproportionate to any arguable benefit he may derive from being in the classroom. See Bender, "The Case Against Mainstreaming: Empirical Support for the Political Backlash", 105 Education 279, 284 (Spring 1985).

We concede it is possible to take some action to protect the other children in the classroom by means other than removing the disruptive child. For instance, the school district in this case

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ered: the Case of Special Education", 48 Law and Contemp. Prob. 63, Winter 1985.



assigned a full-time aid to Doe to ensure the safety of others.[14] In our view such measures should not be necessary. They are intrusive and divert both the students and the teacher from attaining their educational goals. Nor is it clear that having what amounts to a guard in the classroom would be effective. The disruptions, when they come, come with startling swiftness and explosive unpredictability.

Manifestly, the interests of all concerned are best served by keeping the disruptive handicapped child out of the placement where he has caused problems.[15] See Note: Enforcing the Right to an "Appropriate" Education, 92 Harvard L.Rev. 1103, 1121-1124.

There are two cases which support our position although in neither did the court offer an extended analysis of the issue. In *Victoria L. v. District School Board* (11th Cir. 1984) 741 F.2d 369, the handicapped child's behavior was dangerous to others. Nevertheless her parent insisted she remain in her current placement. The district court refused to order the child placed back in the regular classroom and the Eleventh Circuit affirmed, noting that the school authorities "properly exercised the traditional disciplinary authority that they retained under the EHA." 741 F.2d at 374.

In *Jackson v. Franklin County School Board* (5th Cir. 1985) 765 F.2d 535, the court squarely faced the question whether the stay put provision applied to a child who molests another student.[16] The court concluded that "schools have discretion to alter

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[14] Query whether such action is contemplated as a "related service" under the Act. Cf. § 1401(17).

[15] This is not to say the child's education is forfeit to the safety of his classmates. He would continue to be entitled to receive appropriate services although they would be in a setting other than his current placement. The only situation where services to him might be terminated would be where his disruptive conduct is not a manifestation of his handicap. See Ninth Circuit discussion, A. 15.

[16] There is a second *Jackson* decision reported at 806 F.2d 623. As the court itself explained, 806 F.2d at 626, n. 4, the issue in that case was

a handicapped student's placement when he endangers himself or others and threatens to disrupt a safe school environment." Id. at 538. It determined that under such circumstances there was an "exception to the general rule." Id.[17]

**B. 20 U.S.C. § 1415(e)(3) Should Not Be read Literally**

Section 1415(e)(3) does say "the child *shall* remain in the then current educational placement." (Emphasis added.) Such language, however, is not necessarily mandatory.

> "The courts will apply that construction which best carries into effect the purpose of the statute under consideration in order to determine whether the statute is mandatory or directory. . . . The ordinary meaning of language may be overruled to effectuate the purpose of the statute." 2(a) Sutherland, *Statutory Construction*, 4th ed. 1974, p. 650. See also discussion at pp. 656, 658.

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different from the issue presented in the earlier case. The later decision is not relevant here.

[17] While the child was kept out of the facility where he had been educated with non-handicapped children, there is some indication in the opinion that the action of the school authorities was considered an "alteration" or "modification" of his placement. See 765 F.2d at 538. Technically, where a child's placement is merely "altered" or "modified" no "change of placement" within the meaning of the statute has taken place. For example, where a child is shifted from one area of a classroom to another area of that classroom or from one classroom to another comparable classroom, no change of placement has occurred. It could also be argued that "exclusion" of such a child is not a change in placement, see amicus brief of Davis School District, et al., although the Ninth Circuit holds that it is. A. 14-16. In any case, where the child is taken out of the regular classroom and given educational services of a different type, such as placement in a specialized school, he has indisputably experienced a change in placement. See Anno.: When Does Change in "Eduational Placement" Occur, etc. 54 A.L.R. Fed. 570. Our point, of course, is that such a change is permissible and not subject to stay put under the circumstances present in this case.



Nevertheless, the Ninth Circuit ruled that section 1415(e)(3) must be read literally. It noted simply that the section "does not list any exception to its automatic injunction."

An approach identical to the Ninth Circuit's was taken by the court in the *Stemple* case, *supra*. That case involved facts similar to *Burlington*. The parents in *Stemple* removed their child from her current placement and put her in a private school. The Fourth Circuit declined to allow reimbursement to the parents on the ground that their action violated the stay put provision of the EHA. The circuit court ruled "that the statute means just what it says. . . ." 623 F.2d 839, 898.

After the Fourth Circuit had rendered its decision in *Stemple* this court decided *Burlington* where it concluded that a literal reading of section 1415(e)(3) would not effectuate the intent of Congress. The court observed that Congress intended to adopt a flexible approach in these cases. It quoted Senator Stafford, a major sponsor of the Act, as follows:

> " 'We did feel however that the placement or change of placement would not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus, the Conference adopted a flexible approach to try to meet the needs of both the child and the state. 121 Congressional Record 37412 (November 19, 1975).' "

85 L.Ed.2d at 395.

The court then interpreted the legislative history as "favoring a proper interim placement pending the resolution of disagreements over the IEP." 85 L.Ed.2d at 397.

Shortly after *Burlington* was decided the Fourth Circuit conceded that the literal approach it took in *Stemple* was superseded by the *Burlington* decision. See *Hall v. Vance County Board of Ed.* (4th Cir. 1985) 774 F.2d 629, 633.

*Burlington* represented one exception to section 1415(e)(3). This case, we submit, represents another. The language under scrutiny should not be applied woodenly, without reference to its consequences. In the case at bar the gravamen for the stay put stricture is absent. *Cessante ratione legis cessat et ipsa lex.* A

contrary approach would defeat the intent of Congress and do a disservice to those affected by the statute.

## II

## THE NINTH CIRCUIT WAS IN ERROR IN HOLDING THAT A STATE MUST PROVIDE DIRECT SERVICES WHERE A LOCAL SCHOOL DISTRICT FAILS TO DISCHARGE ITS DUTIES WITH RESPECT TO AN INDIVIDUAL CHILD

20 U.S.C. section 1414(d) reads as follows:

"(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter."



As we read that section, subparts (d)(1) and (2) require the state to establish a program for handicapped children when a local school district fails to have a program in place for children within its jurisdiction. Subsection (d)(1) is the provision on which we are focusing in the instant litigation.

Subpart (d)(3) applies where a school district is not equipped to deal with a severely handicapped child who would be better served by attending a school like the State School for the Deaf or the State School for the Blind, or a similar special institution.

The Ninth Circuit has erroneously used language in subpart (d)(3) of the statute (dealing with special schools not operated by a school district) to justify a holding relating to subpart (d)(1) (dealing with programs which *should* be operated by a school district). The court, in other words, held that because there are cases where it is appropriate to place a child in a state or regional facility, the state is obligated to provide services to any child aggrieved by action of a local school district. Subpart (d)(3) does not justify that conclusion; the court's reasoning is flawed.

The Ninth Circuit tried to soften the impact of its holding that the state must provide direct services where a school district is unable or unwilling to provide services in any individual case. The court said:

> "Although the state has broad responsibilities under the EAHCA, they are not absolute. It is not obliged to intervene directly in an individual case whenever the local agency falls short of its responsibilities in some small regard. The breach must be significant (as in this case), the child's parents or guardian must give the responsible state officials adequate notice of the local agency's noncompliance, and the state must be afforded a reasonable opportunity to compel local compliance." A:32-33.

With due respect, we believe this holding amounts to legislating by the court. While the court might be trying to reduce the burden it has placed on the state, nothing in the statute admits of

the procedural sequence fashioned by the Ninth Circuit.[18] We respectfully suggest the court failed to heed this court's admonition that "[i]n assuring that the requirements of the Act have been met courts must be careful to avoid imposing their views of preferable educational methods upon the States." *Rowley, supra*, 458 U.S. at 207.

It seems clear that in subparts (d)(1) and (2) Congress was speaking not of programs for individual children but rather district-wide programs which would be established for children in the area served by the local educational agency. Note that the sections themselves speak in terms of "programs" and "children residing in the area". In the Senate conference report, reference is made to circumstances where the state would "provide special education and related services directly to handicapped children *residing in the area served* by the local educational agency." (Emphasis added.) Senate Conference Report No. 94-455, reprinted at U.S. Code Cong. & Admin. News, 94th Cong. 1st Sess. (1975), p. 1497. In the comments to the relevant regulations the federal government notes, "If a local educational agency elects not to apply for its Part B entitlement, the state would be required to use those funds to insure that free appropriate public education (FAPE) is made available to *children residing in the area* served by that local agency." See comment to 34 C.F.R. section 300.360. (Emphasis added.)

It does not make sense to require a state to step in where an individual child who participates in a district-wide program for handicapped children has encountered difficulty with local educational officials. Where that does occur, the child's parent or guardian has adequate remedies under the due process provisions of the statute. 20 U.S.C. section 1415.

The Ninth Circuit is saying, essentially, that the remedies of 20 U.S.C. section 1415 may be bypassed, that a child dissatisfied with local school district action may compel the state to provide

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[18] This court has indicated its displeasure with any tendentious approach which "would give the courts *carte blanche* to impose upon the states whatever burden their various judgments indicate should be imposed." *Rowley, supra*, 458 U.S. at 190, n.11.



him services directly. But that is not what Congress intended and the statute contains no such election of remedies.

The cases marshaled by the Ninth Circuit to anchor its ruling on this point (A. 32) are readily distinguished. In *Kruelle v. New Castle County School District* (3rd Cir. 1981) 642 F.2d 687, the circuit court simply said that the state had the ultimate responsibility for the provision of educational services in the state. The court was careful to point out however that the lower court had *not* ruled that the state had an obligation to provide a specific educational program for the child. 642 F.2d at 697. Moreover, in *Kruelle*, the court interpreted 20 U.S.C. section 1412; here we are concerned with section 1414. Similarly, in *S-1 v. Turlington* (5th Cir. 1981) 645 F.2d 342, the court's asseveration of state responsibility related to section 1412. 635 F.2d at 350. Neither *Kruelle* nor *Turlington* involved the direct provision of services to individual children.

In *Georgia Association of Retarded Citizens v. McDaniel* (N.D. Ga. 1981) 511 F. Supp. 1263, aff'd. (11th Cir. 1983) 716 F.2d 1565, vacated on other grounds, ____ U.S. ____, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1984), the district court did mention 20 U.S.C. section 1414 although primary reliance was again placed upon 20 U.S.C. section 1412. In that case, unlike this one, the court condemned a systemwide policy regarding the refusal of school authorities to provide services for more than 180 days. The question was whether handicapped children in general could be eligible for services beyond the usual 180-day school term. The state was implicated because of a policy which transcended the problems of any individual child. That is not what is involved here.

Let us suppose that a child who has a severe motor impairment is denied services by a local district. Congress has said that in that situation he may request an administrative hearing. § 1415(b)(2). If he does not obtain relief administratively he may go to state court or federal district court. § 1415(e)(2). Moreover, if time is a problem there is no reason why the child could not go immediately to district court and obtain a mandatory injunction to compel the local district to accord him the educational services to which he is allegedly entitled.

Nowhere is there any indication that Congress intended to allow students to ignore section 1415 and choose to receive state services directly. Forcing the state to provide such services automatically is tantamount to concluding, on the basis of unsubstantiated allegations, that the district has acted improperly. It amounts to prejudging the district's conduct. It may be that the district has a good reason for denying services, that the parents of the child, for example, falsified their statement of residence and do not actually live within the district. The point is that a cessation of services or a district's refusal to provide them should not *ipso facto* trigger provision of services by the state. Rather, these questions should be decided through the orderly procedures set forth in 20 U.S.C. section 1415.

In any event, the state is hardly geared to provide direct services on an immediate basis. It has no roving teams of trained personnel who can set up shop in a district on a moment's notice and deliver specialized services to a child. The state would be compelled to contract with appropriate individuals in the district where the child resides. This could well entail competitive bidding, adherence to affirmative action requirements, Department of Finance approvals, and similar administrative procedures. Such haphazard ad hoc arrangements would be an impediment to the delivery of competent and continuous educational services, a result obviously contrary to Congress' intent.

Direct action by the State would be appropriate where, for example, a district becomes financially insolvent and is unable to run a program for handicapped children. Or where a district makes a conscious decision not to operate a program because it is administratively difficult to do so. In such cases, the state could establish a program at a central location within the district, staff it appropriately, and operate it in an efficient manner with a view toward its long term retention.



## CONCLUSION

For the reasons stated the Ninth Circuit's rulings with respect to the stay put provision and the direct provision of services by the state should be reversed.

DATED: April 27, 1987

Respectfully submitted,

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# JOINT

# APPENDIX

Supreme Court, U.S.
FILED
JUL 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(15)

No. 86-728

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT,
OF PUBLIC INSTRUCTION,
*Petitioner,*

VS.

JOHN DOE AND JACK SMITH,
*Respondents.*

**On Certiorari to the United States Court of Appeals for the Ninth Circuit**

## JOINT APPENDIX

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## RELEVANT DOCKET ENTRIES

### No. 86-728

BILL HONIG,
California Superintendent of Public Instruction,
*Petitioner,*
v.
JOHN DOE and JACK SMITH

| Date | NR | Proceedings |
|---|---|---|
| November 24, 1980 | 1 | Complaint-Civil Rights |
| November 24, 1980 | 3 | Exhibits to Complaint |
| December 12, 1980 | 40 | Preliminary Injunction |
| December 31, 1980 | 43 | First Amended Complaint Civil Rights |
| January 19, 1981 | 45 | Amended Answer to First Amended Complaint Civil Rights |
| February 27, 1981 | 70 | Order Granting Motion to Intervene as a Plaintiff |
| March 25, 1981 | 76 | Complaint of Plaintiff-Intervenor Civil Rights |
| April 8, 1981 | 83 | Answer of Defendant Wilson Riles to Complaint of Plaintiff-Intervenor |
| May 25, 1982 | 155 | Opinion |
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| June 17, 1983 | 233 | Order |
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| July 28, 1983 | 256 | Amended Answer to First Amended Complaint Civil Rights |
| January 23, 1987 | 272 | Judgment |
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| Date | NR | Proceedings |
|---|---|---|
| May 17, 1984 | 309 | Notice of Appeal |
| August 31, 1984 | 340 | Order Re Issuance |
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Attorneys for Plaintiff

In the United States District Court
for the
Northern District of California

Civil No. C-80-4270-MHP

John Doe by his Guardian Ad Litem
[redacted]
Plaintiff,

vs.

William Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as members of the San Francisco Unified School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, individually and in his capacity as Chairperson of the Student Placement Committee of the San Francisco Unified School District; Henry Caruso, individually and in his capacity as principal of the Louise Lombard School in the San Francisco Unified School District; Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruction,
Defendants.

COMPLAINT-CIVIL RIGHTS

[Filed Nov. 24, 1980]

*INTRODUCTORY STATEMENT*

1. This article arises under the provisions of The Education of the Handicapped Act, as amended, 20 U.S.C. § 1401 et seq., and the regulations promulgated thereunder, under Section 504 of

The Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the regulations promulgated thereunder, and under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. Plaintiff seeks declaratory and injunctive relief against defendants for denial of his rights under The Education of the Handicapped Act to receive a free appropriate public education in the least restrictive educational environment, to have all changes of educational placement effectuated in accordance with the procedures prescribed in the Act, and to remain in his currently assigned placement until resolution of any administrative procedures pursuant to the Act. Plaintiff seeks relief from actions of the defendants that have excluded him from participating in a program which receives federal financial assistance solely by reason of his handicap, in violation of Section 504 of The Rehabilitation Act of 1973. Plaintiff also seeks relief from actions of the defendants under color of state law that deprive him of rights, privileges, and immunities guaranteed by the Fourteenth Amendment to the United States Constitution and deprive him of his civil rights guaranteed by The Education of the Handicapped Act and The Rehabilitation Act of 1973 in violation of 42 U.S.C. § 1983.

*JURISDICTION*

2. Plaintiff as a student identified as handicapped seeks to enforce the rights conferred on him by The Education of the Handicapped Act. This Act confers jurisdiction on this Court over plaintiff's claim of defendants' noncompliance with the procedural requirements of the Act regardless of the amount in controversy, 20 U.S.C. § 1415(e)(4). This action also seeks to redress the deprivation under color of state law of rights, privileges, and immunities guaranteed to plaintiff as a handicapped student by the United States Constitution and the anti-discrimination provisions of the Rehabilitation Act of 1973. Therefore, jurisdiction is also conferred on this Court by 28 U.S.C. § 1343(3) and (4).



*PLAINTIFF*

3. John Doe, a seventeen-year old minor, is a resident of San Francisco, California, and a student in the San Francisco Unified School District (SFUSD). Doe is a handicapped child eligible for special education and related services pursuant to The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and the regulations promulgated thereunder, as implemented by the California Education Code § 56000 et seq. Doe was defined as a multi-handicapped child pursuant to federal and California law with a neurological deficit and significant emotional problems, in his Individualized Education Program (IEP) dated April 9, 1980. A true copy of Doe's IEP is attached as Exhibit 1 and incorporated herein by reference. Plaintiff's currently assigned educational placement is Louise Lombard School in the SFUSD. Doe appears in this action through his mother, Mrs. [redacted]

*DEFENDANTS*

4. Wilson Riles is the California State Superintendent of Public Instruction, and as such is responsible at the state level for administering the provisions of Part 30 of the California Education Code governing special education, California Education Code § 56120. Defendant Riles is responsible for administering California Education Code provisions that implement plaintiff's right to a free appropriate public education pursuant to 20 U.S.C. § 1401 et seq., and procedural safeguards of 20 U.S.C. § 1415. Defendant Riles is responsible for insuring that each California local school district is in compliance with 20 U.S.C. § 1401 et seq. and the federal regulations promulgated thereunder.

5. William Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, and their legal successors in office, constitute the San Francisco Unified School District Board of Education. The SFUSD Board of Education has overall responsibility for establishing policies for the operation of the SFUSD, including policy concerning the provision of publicly-funded special education programs for students in the SFUSD, and for the exclusion or expulsion of students from the SFUSD.

6. Robert F. Alioto is the Superintendent of the SFUSD, chosen and appointed by the SFUSD Board of Education, to carry through procedures created by the Board or mandated by law, including operation of the special education programs in the SFUSD. Defendant Alioto is responsible for insuring that handicapped students in the SFUSD are treated in compliance with 20 U.S.C. § 1401 et seq. as implemented by California Education Code § 56000 et seq., and in compliance with 29 U.S.C. § 794.

7. Robert Figone is the Chairperson of the Student Placement Committee of the SFUSD. The Student Placement Committee, through its Chairperson, processes disciplinary referrals of students from SFUSD school principals and recommends expulsion or exclusion to the Board of Education. Defendant Figone is responsible for administering California Education Code disciplinary provisions and SFUSD disciplinary policies, as Superintendent Alioto's designee.

8. Henry Caruso is the principal of Louise Lombard School in the SFUSD, and as such is responsible for the operation and administration of Louise Lombard School in compliance with SFUSD Board of Education policies and state and federal law. Defendant Caruso is responsible for supervision of the educational programs of multi-handicapped students at Louise Lombard School.

9. All defendants are sued in their individual as well as their official capacities.

*NARRATIVE OF EVENTS*

10. Plaintiff Doe was assigned to Louise Lombard School in the SFUSD on June 19, 1980 (see Exhibit 1, page 1) in conformance with his Individualized Education Program. Doe attended classes at this school during the fall of 1980.

11. On November 6, 1980, Doe was involved in an incident with another student at Louise Lombard School. As a result he was suspended from school for five days. A true copy of the Notice of Suspension is attached as Exhibit 2 and incorporated herein by reference.



12. This incident, and one previously reported, occurred during a period of emotional stress and taunting by Doe's peers. His reaction was totally in keeping with, and probably caused by, his handicap as described in the IEP: neurological deficit and significant emotional problems. A report of a comprehensive neurological assessment by Napa State Hospital, in February, 1980, was included in Doe's school file at Louise Lombard School and was available to all members of the staff. It found significant Doe's history of psychiatric treatment and medications and his reported periods of "conking out". The report diagnosed, in part, latent convulsive susceptibility, mild hemiparesis, and cerrebellar dysfunction, and Adjustment Reaction to Adolescence in reaction to peer pressures and teasing. A true copy of the Napa State Hospital report is attached as Exhibit 3, and incorporated herein by reference.

13. On November 14, 1980, the principal of Louise Lombard School, Henry Caruso, referred Doe to the Student Placement Committee of the SFUSD. A true copy of the Student Placement Referral is attached as Exhibit 4 and incorporated herein by reference. The basis for the referral was the incident that occurred on November 6, 1980 (see Exhibit 4, page 1). Defendant Caruso requested that Doe either be expelled or excluded from the SFUSD pursuant to California Education Code sections 48211, 48212, 48904.5, 48905, and SFUSD Board of Education Policy 5114. A true copy of SFUSD Board of Education Policy is attached as Exhibit 5 and incorporated herein by reference.

14. On November 14, 1980, a meeting was held at Louise Lombard School which was called by Defendant Caruso. In attendance were Doe and his mother, Doe's attorney, Sheila Brogna, and Mr. Caruso. Mr. Caruso informed Doe that he was referring Doe to the Student Placement Committee for expulsion from the SFUSD. Doe objected to this action by Defendant Caruso, and stated his desire to remain at Louise Lombard School.

15. On November 14, 1980, Doe's attorney Sheila Brogna wrote a letter to the SFUSD protesting the referral of Doe to the Student Placement Committee for expulsion, and asking instead that special education administrative procedures be initiated con-

cerning Doe. A true copy of this letter is attached as Exhibit 6 and incorporated herein by reference. No response to this letter has been received by plaintiff or his attorney. Plaintiff and his attorney have not been notified of the initiation of any special education procedures by the SFUSD.

16. On November 17, 1980, Doe and his mother were notified that a meeting of the Student Placement Committee would be held on November 25, 1980, to review Doe's expulsion or exclusion from the SFUSD.

17. Over Doe's and his mother's objections, John has not been allowed to attend his classes at Louise Lombard School since November 6, 1980, nor has he been provided with any alternative educational placement or program.

## *LEGAL FRAMEWORK OF PLAINTIFF'S CLAIM*

### *The Education of the Handicapped Act*

18. The Education of the Handicapped Act, 20 U.S.C. §1401 et seq., as amended, and the regulations promulgated thereunder, 34 C.F.R. Part 121a, detail specific rights to which handicapped children are entitled. Included among these are:

(a) The right to a "free and appropriate public education," 20 U.S.C. §1401(16) and (18); 34 C.F.R. §121a.1, §121a.4, §121a.14;

(b) The right to remain in the current educational placement during any proceeding related to the placement of the child or the provision of a free appropriate public education, 20 U.S.C. § 1425(e)(3); 34 C.F.R. § 121a.513;

(c) The right to education in the "least restrictive environment," 20 U.S.C. § 1412(5)(B); 20 U.S.C. § 1414(a)(1)(C)(Iv); 34 C.F.R. § 121a.132, § 121a.227, § 121a.550-553;

(d) The right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, and 34 C.F.R. § 121a.500-514.



19. States are required by 20 U.S.C. § 1412(4) and 20 U.S.C. §1441(a)(5) to insure that each local educational agency in the state establishes and maintains an individualized eductional program for each handicapped student. The local public educational agency is held responsible by 34 C.F.R. 121a.343 for initiating and conducting meetings for the purpose of developing, reviewing and revising a handicapped child's individualized education program.

20. State and local educational agencies are required by 20 U.S.C. §1415(a) and 34 C.F.R. 121a.501 to establish and maintain a system of procedural safeguards with respect to the provisions of a free appropriate public education to handicapped students by these agencies. These safeguards include:

(a) Written notice to the parents of a handicapped child a reasonable time before the public agency proposes to change the educational placement of the child or the provision of a free appropriate public education of the child, 20 U.S.C. § 1415(b)(1)(c) and 34 C.F.R. § 121a.504;

(b) This written notice must include a full explanation of all the procedural safeguards available to the parents and a description of the action proposed, and explanation of why the agency proposes to take the action, and a description of any options the agency considered and the reasons why those options were rejected, 20 U.S.C. § 1415(b)(1)(D) and 34 C.F.R. § 121a.505;

(c) The parents of the child must be provided with an opportunity for an impartial due process hearing on any proposal to change the educational placement of the child or the provision of a free appropriate public education to the child, 20 U.S.C. § 1415(b)(2) and 34 C.F.R. 121a.506-512;

(d) During the pendency of any administrative or judicial proceeding concerning the child's placement or program, the child must remain in his then current educational placement unless the public agency and the parents of the child agree otherwise, 20 U.S.C. § 1415(e)(3) and 34 C.F.R. 121a.513.

21. The SFUSD, directly and through the California State Department of Education, receives Federal financial assistance

under The Education for The Handicapped Act, which is utilized by the schools in the SFUSD, including Louise Lombard School, for services to handicapped children.

## *CALIFORNIA EDUCATION CODE PROVISIONS RELATING TO HANDICAPPED STUDENTS*

22. The Federal Education of the Handicapped Act requires states to meet the above described requirements in order to qualify for financial assistance for public education for the handicapped. California law implementing this federal law is found at California Education Code § 56000 et seq. (Statutes 1980, Chapter 797, Effective July 28, 1980).

23. California law provides to each handicapped student "an education appropriate to his needs in publicly supported programs. . . " Education Code § 51216.

24. The California Education Code places certain requirements on each local school district concerning handicapped students, in compliance with Federal Education For The Handicapped Act, including:

(a) Each school district must initiate and conduct meetings for the purposes of developing, reviewing and revising the IEP of each individual with exceptional needs, Education Code § 56340;

(b) An IEP team must meet whenever the pupil's placement, instruction, services, or any combination thereof as specified in the IEP is to be developed, changed or terminated, Education Code § 56343(b);

(c) Specific due process hearing procedures apply whenever there is a proposal to change the educational placement of a child, or the provision of a free, appropriate public education to a child, Education Code § 56501;

(d) These due process procedures include the right to a fair and impartial administrative hearing at the state level before a person knowledgeable in the laws governing special education and administrative hearings, Education Code § 56501(b)(3);



(e) During the pendency of the hearing proceedings the pupil is entitled to remain in his present placement, Education Code § 56505(d). Certain limited exceptions are provided if the District follows procedures for removal of a student from his placement in accordance with Title 5, California Administrative Code § 3308. The SFUSD did not follow those procedures in Doe's case.

### *Section 504 of The Rehabilitation Act of 1973*

25. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the regulations promulgated thereunder, 34 C.F.R. Part 104, prohibit the exclusion, solely by reason of his handicap, of any otherwise qualified handicapped individual in the United States, from participation in, from the benefits of, or from being subject to discrimination under any program or activity receiving Federal financial assistance.

26. Each qualified handicapped person is entitled to a free appropriate public education, regardless of the nature or severity of the person's handicap, 34 C.F.R. § 104.33.

27. The SFUSD, directly and through the California Department of Education, receives Federal financial assistance, and is therefore subject to the requirements of Section 504.

## *CAUSES OF ACTION*

28. Defendants have denied plaintiff his rights under The Education of the Handicapped Act and Section 504 of The Rehabilitation Act.

29. Plaintiff Doe has been denied his right to a free and appropriate public education, which is guaranteed to him by both The Education of the Handicapped Act and Section 504 of The Rehabilitation Act, since November 6, 1980.

30. Plaintiff has been excluded from his educational placement, which is an attempt by defendants to change Doe's educational placement in violation of the procedures prescribed by The Education of the Handicapped Act.

31. Plaintiff has been denied his right, guaranteed to him by The Education of the Handicapped Act, to remain in his educational placement while proceedings concerning his educational placement take place.

32. Plaintiff has been denied his right to an education in the least restrictive environment, guaranteed to him by The Education of the Handicapped Act, since November 6, 1980, in that defendants have totally excluded Doe from his educational placement and have not provided him with an alternative educational placement.

33. Defendants have failed to observe the procedural safeguards which are required by The Education of the Handicapped Act when the school district proposes to change the educational placement of a handicapped child such as Doe. In violation of this Federal law, defendants have failed to provide to Doe and his parents proper notice, which should have included a description of all procedural safeguards which The Education for the Handicapped Act requires, a description of options the school district considered, and the reasons they were rejected.

34. Defendants have failed to convene an IEP team meeting to consider the proposal for change or termination of Doe's educational placement, instruction or services.

35. Defendants have denied Doe his right, under Section 504 of The Rehabilitation Act of 1973, to a free, appropriate, public education regardless of the nature or severity of his handicap, since November 6, 1980.

36. Defendants have discriminated against Doe in violation of Section 504 of The Rehabilitation Act of 1973, by excluding him from the SFUSD, a program that receives Federal financial assistance, solely by reason of his handicap.

37. Defendants, acting under color of state law, have deprived Doe of rights, privileges and immunities guaranteed to him by the Fourteenth Amendment to the United States Constitution and deprived him of his civil rights guaranteed him by The Education of the Handicapped Act and The Rehabilitation Act of 1973 in violation of 42 U.S.C. § 1983 in that defendants are excluding or



expelling Doe from the SFUSD pursuant to disciplinary provisions of the California Education Code and are thereby violating the provisions of Federal law.

38. Defendants have deprived Doe of his due process and equal protection rights guaranteed to him by the Fourteenth Amendment to the United States Constitution by excluding him from the SFUSD in violation of the procedures required and solely on the basis of his handicap.

39. All of these harms to Doe will continue in the future because due to the nature of Doe's handicap the behavior by him which is the basis for defendants' action is likely to reoccur and defendants will continue in their violation of Federal law as herein described, unless they are prohibited from so acting by this Court.

## *PRAYER FOR RELIEF*

WHEREFORE, plaintiff respectfully prays that this Court:

1. Enjoin defendants from conducting a hearing to expel or exclude plaintiff from the SFUSD;

2. Declare that defendants must observe the procedures required by 20 U.S.C. 1401 et seq. whenever a proposal is made to change the educational placement, instruction or services provided to a handicapped student or whenever in fact the educational placement, instruction or services to a handicapped student are changed;

3. Declare that defendants must immediately convene an IEP team meeting to review plaintiff's educational placement, instruction and services, pursuant to 20 U.S.C. § 1401 et seq.;

4. Declare that defendant's exclusion of plaintiff from the SFUSD violates Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, violates The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and violates plaintiff's due process and equal protection rights under the Fourteenth Amendment to the United States Constitution;

5. Declare that defendants' policies, practices and procedures in excluding handicapped children from the SFUSD violate

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, violate The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and violate the due process and equal protection rights of handicapped children and students under the Fourteenth Amendment to the U.S. Constitution;

6. Order defendants to expunge from plaintiff's SFUSD files any record of, or reference to, plaintiff's referral to the SFUSD Student Placement Committee;

7. Declare that defendant Wilson Riles as California State Superintendent of Public Instruction establish policies, and insure, that the procedures for the change of educational placement of handicapped children in the State of California comply with the procedural safeguards and requirements of 20 U.S.C. § 1415;

8. Award to plaintiff all appropriate damages, including punitive damages;

9. Award to plaintiff all costs of suit;

10. Grant such other and further relief as this Court may deem just and proper.

DATED: November 23, 1980.

Respectfully submitted,

/s/ SHEILA BROGNA
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/s/ SUSAN SPELLETICH
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Attorneys for Plaintiff

In the United States District Court
for the
Northern District of California

Civil No. C-80-4270-MHP

John Doe, by his Guardian Ad Litem
[redacted]
Plaintiff,

vs.

William Maher, et al.,
Defendants.

# EXHIBITS TO COMPLAINT
[Filed Nov. 24, 1980]

**Exhibit 1**

San Francisco Unified School District
Special Programs and Services
Individualized Education Program (IEP)

| 2/9/60 | | | April 9, 1980 |
|---|---|---|---|
| Date | | | Date of Meeting |
| _____ IEP Review | | | |
| Date | | | |

| DOE | JOHN | | F(M) | 5-14-63 | 16-3 |
|---|---|---|---|---|---|
| Last Name | First Name | Student No. | Sex | Birthday | CA |

| [redacted] (Mother) | [redacted] | [redacted] |
|---|---|---|
| Parent/Guardian | Address | Phone(s) |

| | | | Mexican-American |
|---|---|---|---|
| Grade | Regular Education Teacher(s) | School | Ethnic |

| English (also Spanish | Yes (No) | School Site |
|---|---|---|
| Primary Language of Home | Interpreter Required | Location of Student Records |

| May 7, 1980 | 1 year | Program Manager |
|---|---|---|
| Implementation Date | Projected Duration | Personnel Responsible for Overall Implementation of IEP |

Primary Handicap

Multi-Handicapped (neurological deficit, slow learner, significant emotional problems "mild hemiparesis due to congenital cerebral malformation" neurologic report 2/25/80 Napa State Hosp.

Recommended Program Placement/Rationale for Placement (least restrictive concept) SDC for MH child in small school setting with individualized instruction and counseling available on site.

Extent of Regular Class Placement.

Services to Regular Education Teacher(s).

Specially designed P.E. Program.

Job Explanation and Training Prevocational/Vocational Program.

| Committee Members | | Approved Yes | IEP No* | | | Approve Yes | IEP No* |
|---|---|---|---|---|---|---|---|
| Linda Warner<br>Administrator | 4-9-80<br>Date | | | Georgia M. C<br>Nurse/Medical Representative | 4/9/80<br>Date | | |
| [redacted] | 4-9-80 | | | | | | |
| Parent/Legal Guardian | Date | | | Speech Language Specialist | Date | | |
| Regular Education Teacher | Date | | | Student | Date | | |
| Carolyn King<br>Special Education Teacher | 4-9-80<br>Date | | | Also in Attendance | 4-9-80<br>Date | | |
| Sylvia Morheit<br>Psychologist | 4/9/80<br>Date | | | Also in Attendance | 4-9-80<br>Date | | |

To be completed by the Program Manager, Special Education Instructional Services.

| Louise Lombard | MH | | 6/29/80 | | |
|---|---|---|---|---|---|
| School Site | Program | Placement Date | Placement Permission Sent | Receiving School | Sending Notified |

FORM X



San Francisco Unified School District
Special Programs and Services
Individualized Education Program

| ??/63 | Doe | John |
|---|---|---|
| Birthdate | Last Name, | First Name |

(Use addendum if more space if necessary)

## *CURRENT LEVELS OF EDUCATIONAL PERFORMANCE*

Academic/Cognitive Wide discrep—bet V & Perf.

Mo. says her son is *not* mentally retarded. Says he has "neurosis" and is brain damaged. Mr. Cordero, Psychol., says he is not truly M R. Bright enough to know is different. Becomes confused Stanford Diagnostic Testing; 3rd grade in Math, 3rd grade in Reading. (on medication)

Communication: Speech/Language/Auditory

Auditory discrimination is at 1st grade level. Has braces on teeth. Bi-lingual, but English spoken at home. Appearance of being mentally slow because of manner of communication. Speech problems persist.

Psychomotor Skills: Gross, Fine, Visual

Imbalance in gait. Tremors. Progressive neurological disease currently ruled out. Brain damaged, Clumsy, poor. Problems in expression & comprehension. Needs skills building in visual-motor integration. Nystigmus, wears glasses. Mouth breather . . . has
L-R orientation prob.

Self-Help Skills/Prevocational-Vocational

6′ tall; 195 lbs. Able to learn to take the Muni. Can wash dishes & clean the house. Is sloppy in terms of self-help skills, brushing teeth, wiping nose. Sloppy in appearance. Vocational, job exploration & vocational assessment.

Behavior/Social Adaptation (Strengths Weaknesses)

Very depressed. Mo. says he is shy, withdrawn; a loner. If peers are aggressive towards him, he will respond aggressively. Social

skills have deteriorated. (mo.) He tolerates frustration up to a point, & then explodes. Immature. Doe conscious of need to control impulses. Expressive.

Student Interests, talents, effective reinforcers

Needs to experience success. Likes to work with model cars; TV; "microscopes; wants a motorcycle. Doe says he wants to work in restaurant" says he is interested in "doing math or spelling. Says he loves science."

Learning/Teaching Styles; Learning Environment; Special Media and Materials

John can get into difficulty by becoming a *scapegoat* if he is not in a closely structured environment. He invites ridicule. He does not know how to relate to peers. Mo. says he requires a great deal of patience. Needs a lot of attention, in a small grp, with individualized attn., in a small school setting. *Impulse control & control of anger a problem. Could NOT function in a Public School.*

Medical Information (use addendum if necessary)

School records can be obtained directly from Napa State Hosp., vice. IEP. Currently only on Valium. Dr. Rafael Vaca is current M.D. & Dr. Zanger.

A range of placements has been discussed Yes ☒

Services: Vocational assessment

Initiation Date: When available—TBA

Person(s) Responsible: SFUSD



Exhibit 1 Page 3

Individualized Education Program
Goals and Objectives
Date: April 9, 1980

Student's Name: John Doe

Birthdate: 5/14/63

Annual Goal: Academic skills building program

Short Term Objective:

Time: 1 yr.

Evaluation Conditions: Currently reading comprehension at 3rd grade.

Criteria: 80% Functional reading-survival skills & sight vocabulary.

Person Responsible: Classroom teacher.

Annual Goal: Social skills.

Short Term Objective:

Time: 1 yr.

Evaluation Conditions: Improvement in ability to relate to peers & cope with frustrating situations without resorting to aggressive acts.

Criteria: 80%

Person Responsible: Classroom teacher & student.

Annual Goal: Self-Help skills.

Short Term Objective:

Time: 1 yr.

Evaluation Conditions: Observation by tchr & support staff (if any).

Criteria: 80% Improvement in appearance & grooming.

Person Responsible: Student.

San Francisco Unified School District
Special Programs and Services

Name: John Doe
Birthdate: 5/14/63
Date of Meeting: April 9, 1980

*INDIVIDUALIZED EDUCATION PROGRAM ADDENDUM*
(OPTIONAL FORM)

This page is available to supplement information for any section of the I.E.P.

(1) 12/18/79 (Napa) Treatment Team: Plan 6: Psychotropic medication by MD & PT to reduce agitation and control thought disorder.

(2) 2/25/80 (Napa State Hospital): "No thought disorder or overtly psychotic manifestations." [Unpredictable behavior when not on medication.]

(3) Caution in use of machinery: He has a L-R and spatial orientation problems. (Organic brain syndrome +) See Napa reports.



**Exhibit 2**

San Francisco Unified School District
Notice of Suspension

School: Louise M. Lombard School, School No. 694,
Date: Nov. 6, 1980
Student's Name: John Doe, Student Number No. H008743505
Grade: Homeroom 9, Date of Birth: [redacted]
Ethnic Code: SS, Male: X Female ___
Parent/Guardian: [redacted] Telephone [redacted]
Address: [redacted] Avenue, Zip Code: [redacted]
Number of School Days Suspended: 5
To Return On Friday, November 14, 1980
At The Start of the School Day
Previous Suspensions This School Year: None
No. of Days: 0
Reason For Suspension: State Education Code 48900 Item: AC
(See reverse side)
Caused damage to school property.
Caused physical injury to another student
Has the student been afforded due process prior to issuing this suspension?
Yes X No ___ Emergency Situation: A danger to other students
See reverse side: Due Process Clause.
State Education Code 48900 "F" Parents or guardians of any pupil shall respond without delay to any request from school officials to attend a conference regarding their child's behavior while on school grounds or during an activity off school grounds related to school attendance.
You are hereby requested to attend a conference with: Henry Caruso on Friday, May 14, 1980. Time: 9:00 a.m. at 709 Font Boulevard
If this date is not convenient, please telephone 585-4488
Referred to pupil services: Yes X No ___
Homework assignments will be provided. N/A
Pupil is not to be on or near the school campus during the period of suspension
Parent contacted by Henry A. Caruso, Date of contact: 11/6/80

Method of contact: Telephone ___ Mail _X_ Other ___

Henry A. Caruso
Principal

Please see reverse side for State Education Code sections relating to student suspensions.

CUM FOLDER THRU COUNSELOR



**Exhibit 3**

## REFERRAL AND REPORT

Problem #6, entered 1/28/80—"Needs extensive neurologic evaluation."

Name: P. Van Auken, M.D. Date: Unit: 1172

### Report

### NEUROLOGIC ASSESSMENT:
February 22 and 25, 1980

BASE DATA: This 16-9/12-year-old, half Spanish-American male was transferred from McAuley to the Adolescent Unit of Napa State Hospital on November 5, 1979, under a San Francisco Conservatorship 5358 with an admission diagnosis of Schizophrenia, chronic undifferentiated type. Because significant neurological problems have become apparent, an extensive assessment has been requested in order to aid in management and planning for this patient.

In order to do so, the present evaluator has reviewed the extensive records of the patient, spoken over the telephone at length with his mother, Mrs. [redacted], and interviewed as well as examined the patient. The emphasis of the current assessment will be as requested, on the Patient's neurologic problems. Hence his psychiatric and social problems, dealt with by Napa State Hospital staff, a Court Intake and Transfer Summary dated June 14, 1979, and in his two McAuley discharge summaries, will not be dealt with in detail.

Doe's mother is a limited, but reasonably reliable, historian. Other professionals who have interviewed her have even suggested that she may be evasive or obstructive on given issues. Doe himself is an extremely limited and unreliable historian due to his basic neurologic and mental deficits rather than from lack of motivation or wish to be other than truthful.

*Developmental History:* Doe was the product of the eighth pregnancy of his 35-year-old Mexican-born mother, conceived during her third marriage (which lasted only a few months) to

Mr. [redacted] born in San Francisco. Mrs. [redacted] described the pregnancy as difficult, with excessive accumulation of water and a weight gain of 75-80 lbs. (suggesting either edema or polyhydramnios) and lasting 11 months. Doe was born at San Francisco General Hospital, following a 5-6 hour, uneventful labor and vaginal delivery. By description he had a very large head (his first McAuley record stated head Circumference was 37.5 cm—at very upper limits of normal for sex—but gave no source); his jaw may have been malpositioned, as were his lower limbs. Mrs. [redacted] stated he was "stained like a blue baby", suggesting meconium staining. he seemed otherwise normal. The actual birth records, if still in existence, will be sought.

There apparently were no neonatal difficulties. The baby was breastfed. By 6 months of age, or earlier, his legs were put in braces, to which his mother described his motor development which was much slower than that of her previous children. He sat late, perhaps only at age 2 years, stood between 2½-3 years of age, and walked shortly after that at about age 3 years. He was toilet-trained at about the same time. After starting to walk, he was given special orthopedic shoes.

His teeth also came in very late (at 3-4 years) and were "very oddly shapped", to which Doe's mother attributed his not talking until about 4 years of age. Shortly after that, he started receiving speech therapy.

Mrs. [redacted] spoke of John as being "no trouble". She never considered him either hyper-or hypoactive. However, the neighborhood children used to tease him and call him a "monster" because of his large head and malformed teeth. They also chased him and often beat him up, as a result of which Doe became often very angry at them, and later, when he entered school, feared going there.

Early childhood health appears to have been good. He was probably followed at a Kaiser clinic or hospital. He had several ear infections, and may have had his drums lanced up to 4 times as a result.

It is not clear when or where Doe was found to have an iron-deficiency anemia, and a diagnosis of infantile cortical hyperosto-



sis (Caffey's disease) was made, and "hydrocephalus ruled out". This information was contained in the first McAuley discharge summary of 8/9/78. Mrs. [redacted] recalled only that she was told that John had some kind of bone disease of the skull sometime before he started school. CAT brain scans obtained in '78 and '79 will be mentioned at the end of *Previous Neurologic Evaluations* below.

*Educational History:* As mentioned, Mrs. [redacted] reported that John received speech therapy from about age 4 to 5 years on.

At 6 years, he was placed in special classes, because he was a "slow learner". As a consequence and because of the reported teasing and occasional "tormenting" by peers, he developed "bizarre behaviors", wandering around in the classroom, becoming "isolative" but with "volatile rage reactions" towards peers. He remained no major problem at home.

From February to June, 1972, i.e. 9 years + 3 months of age, he had a home-bound teacher.

Because it was felt that his educational needs were not being met, he was placed at the Fairfield School in San Francisco, a private institution for handicapped children, under AB95 funds, from September 1972 until either March or, as stated elsewhere, December 1976. N.B. All reports agree *that he made substantial educational gains there.*

He reentered public education in January 1977, at the Marina Junior High School in a protected setting for the orthopedically handicapped, but was dismissed from there in March 1977 because of "temper tantrums" and "poor peer relationships". Thereafter he again received home tutoring, until his subsequent admissions to McAuley and elsewhere, commencing in June 1978.

His multiple psychological evaluations are documented in the record and will be mentioned primarily as they relate to possible "organicity". In March 1976, at a chronologic age of 12 years, 10 months, despite a Full Scale IQ of supposedly 90, he reportedly had a Mental Age of 7.3. Some organic impairment was sus-

pected. On the Finger Tapping Test, generalized cortical dysfunction was evident. During his first McAuley admission, June to August 1978, at age 15 years, he achieved an age equivalent of 10 years on the Peabody Individual Achievement Tests. His highest scores were in word recognition and reading comprehension; mathematical skills in particular were poor, as was his fund of general background information.

While at Fred Finch, between his two McAuley admissions, he was felt to have good basic work attack skills; while reading accuracy was assessed as poor, he showed improvement with help given.

Here at Napa State Hospital, psychological evaluation by D. Inman, Ph.D., on January 3, 1980, dealt primarily with psychodynamics. However, some visuo-perceptual problems were suspected, as were difficulties with R-L orientation. It was felt that the patient was immature, but wanted and responded to human contact.

Doe's educational deficits and needs are detailed meticulously in his Napa State Hospital records.

Neuropsychological testing has, as best as I can determine, not been performed.

*Psychiatric History:* Again this is dealt with extensively by previous evaluators. While there is ample evidence of the boy's emotional reactions to school failures and teasing by peers, serious emotional problems appear to have surfaced largely after his transfer from the private Fairfield school to Marina Junior High in San Francisco.

His first McAuley admission was from 6/22-8/9/78. He presumably had, in addition to poor impulse control and rage reactions, some auditory hallucinations since ca. age 14. Treatment included dopaminergic blocking agents. Discharge diagnosis was "Adjustment Reaction of Adolescence with psychotic features" on transfer to the Fred Finch facility in Oakland.

Apparently he tried to run away from there. It appears highly likely that tremors were first noted in the spring of 1979, and felt



to be phenothiazine-related. Continued inability to control impulsive, violent behaviors led to readmission at McAuley.

He was there the second time from 7/22-10/11/79, shortly after which he was admitted to Napa State Hospital. While at McAuley, he continued to experience difficulties with peers. However, on this admission to McAuley, he was felt not to be psychotic. He was on stelazine and Prolixin as well as Cogentin, but these were stopped during the first month because of tremor of his hands, especially the left. While off these neuroloptics, his behavior grew increasingly unpredictable. Tremors may have been dose-related to Stelazine.

Since at Napa State Hospital, there had been no gross evidence of psychotic behaviors, and even his explosive reactions to peers and stresses appear to be less. However, he has requested medications to help him. Initially placed on Thioridazine 800 mg./day, this has been reduced to 100 mg. at 1000 and 100 mg. h.s. because of continued parkinsonianism; chlordiazopoxide HC1 10 mg. q.i.d. was added 2/24/80.

*Possible Seizures:* Doe's mother was certain that John never had any seizures while living with her. If the undersigned understood her correctly, she described some "shaking" which came on probably while he was at the Fred Finch facility in Oakland. She attributed this to medications, and thought Doe may have been seen for this in Berkeley. She does not recall his ever having been on anticonvulsants. Doe, himself, mentioned having "something like fainting spells" or "conking out", but thought these occurred "not long ago". He also could not recall ever having been on anticonvulsants or medications before his admissions to McAuley. Both his mother and some observers here at Napa State Hospital mentioned "blank spells", but his mother felt that these occurred when he was trying to think of answers.

An EEG obtained during his first McAuley admission in 1978 was reported in the discharge summary as showing diffuse slowing without focal abnormalities. Slowing was thought to be medication-related, but the patient was on no medications at the time.

His first Napa State Hospital EEG on 11/26/79 early during this admission was read by Dr. Yeager as "slow, with mixed

paroxysmal dysrhythmia, diffuse, moderate". A repeat EEG on January 21, 1980, was "essentially the same". Both suggested to Dr. Yeager "the presence of diffuse organic dysfunction as well as a latent convulsive susceptibility".

Because of the history of possible seizures and of "blank spells" given by the patient and the paroxysmal activity recorded independently from the right and left hemispheres on the EEG of November 1979, a therapeutic trial of phenytoin 300 mg./day was recommended by Dr. R. K. Stone on 12/13/79. On 1/8/80, Doe reported that "Dilantin helps me. I don't feel like conking out when I get mad now." A phenytoin level on 1/2/80 was 7.5 ug/ml; on 1/20/80 it was 7.3 ug/ml. Dr. Van Auken has increased the daily phenytoin to 400 mg. No overt seizures or equivalent phenomena have been observed.

*Previous Neurologic Evaluations:* Doe has been seen by a number of neurologists in the past, in part to determine a possible underlying cause for his educational and behavioral difficulties, and for the phenothiazine side effects.

During his first McAuley admission, June-August 1978, he was seen, according to the discharge summary by Drs. C. Khlentzos and M. McAuliffe. Principal findings showed generalized hypotonia with hyperreflexia, decreased coordination and pincer grasp, especially in the *left* upper extremity. *No tremor or other adventitious movements were observed at that time.* Because of the finding of 7-10 cafe-au-lait spots on the torso, though no other pathognomonic lesions, the possibility of a congenital neurocutaneous syndrome without specific classification was raised.

During his second McAuley admission, Doe was seen in neurologic consultation by Richard Cuneo, M.D., on 10/10/79, just prior to the patient's transfer to Napa State Hospital. Dr. Cuneo remarked that the pill-rolling tremors of the patient's hands, especially the left, were first noted in the spring of 1979 while Doe was at Fred Finch. Dr. Cuneo also noted some facial masking and decreased rate of blink, cog-wheel rigidity greater in the left than right arm, and gait "en bloc" with decreased associated movements. He remarked on the fact that



while Doe was taken off phenothiazines initially during this second admission to McAuley, he was back on Stelazine and Prolixin with increased tremor, despite some Cogentin. Increase in Cogentin resulted in some decrease in tremor. Dr. Cuneo's diagnostic impression was "Parkinsonism secondary to use of dopaminergic blocking agents".

Doe has also been seen several times in the Neurology Clinic by Dr. R. K. Stone, namely on 11/16/70, 12/13/70, and 1/11/80. Dr. Stone confirmed previous findings of mild dysmetria, greater on the left, mild difficulties with tandem gait, slight accentuation of deep tendon reflexes on the left, bilateral plantar extensor responses (also a tendency toward withdrawal), nystagmus in the resting position and an enlarged optic cup on the right. He also noted minor areas of hyperpigmentation on the patient's thorax, and no axillary freckling. He also noted the various features of parkinsonism, quite similar to those above seen by Dr. Cuneo, and further noted on 1/11/80 that despite significant reduction of thioridazine from 800 mg/day in November to 300 mg/day, the patient "seemed increasingly parkinsonian." In mental status examination, Dr. Stone found that Doe didn't always understand what was said to him, that his behavior was appropriate to the situation, and that there was no present evidence of thought disorder or hallucinations. Dr. Stone's impression was that Doe was a basically somewhat slow and ungainly child who reacted to teasing by other children by explosive outbursts of behavior.

In addition to recommending a reduction in dosage of thioridazine, Dr. Stone initiated further diagnostic studies. These included the following:

1. *EEG,* which was done on 12/13/79, and discussed under *Possible Seizures.*

2. *Review of the two CAT brain scans,* without and with enhancement, done while Doe was at McAuley, the first at Franklin Hospital on 7/31/78 and the second at St. Mary's on 7/26/79. together with Dr. Khajavi, radiologist at Napa State Hospital, this review (12/20/79) confirmed the findings of enlarged lateral and III ventricles, sulci, and fissures, consistent with

brain atrophy, and also a probable small cavum septum pellucidum. the two scans looked essentially the same. However, Dr. Stone also noted that there was slightly more involvement of the right hemisphere, correlating with the mild left hyperreflexin on his examination. The diagnostic possibility of "hydrocephalus ex vacuo" was raised.

3. *Lead screen* was negative with FEP 46 ug/ml and lead 17 ug/ml.

4. *Urine amino acid* screen (1/2/80): negative.

5. *BP* (2/5/80) negative with protein 17 mg., glucose 69 mg., and VDRL negative.

*Skull films* had been done on 11/8/79 and showed a large calvarium, especially in the A-P , and normal sutures, a sella turcica normal in size and contour, and no intracranial calcifications. There was slight asymmetrical thickening of the right parictal bone and slight asymmetrical elevation of the left petrous bone. Dr. Khajavi read these x-rays as showing an essentially normal skull.

REVIEW OF SYSTEMS: [redacted] could not tell me of any significant medical symptoms or problems.

FAMILY HISTORY: Extremely meager data was available through my telephone interview of Mrs. [redacted] and the chart review.

*Father*: [redacted] born 1/3/32 in San Francisco, was "always nervous" and had "emotional problems" for which he was seen at Langley Porter November '54 to February '55. He supposedly attained the ninth grade. In the record an IQ of 74 is reported. He was committed to Napa State Hospital in 1962, and transferred to the Palo Alto V.A. Hospital in September 1963; unfortunately, the Napa State Hospital records are no longer available.

*Mother*: [redacted] born 7/18/28 in Tampeca, Mexico, left 6th grade at age 12 years. She has arthritis and hypertension.



*Siblings*: Mrs. [redacted] mentioned *7* half-sibs, *but* mentioned only *4* boys and *2* girls, all older than Doe, and presumably all well.

Mrs. [redacted] knew of no retardation, mental disorders other than in John's father, or stigmata suggestive of neurofibramatosis, nor any other major medical problem I asked her about in the family.

NEUROLOGICAL EXAMINATION: This was a quiet, very cooperative, rather Hispanic-looking, slightly obese, 16¾-year-old young man. He appeared clean, and was probably dressed as best he could be. His behavior throughout the examination was appropriate; in fact, he was quite patient, even when I asked him to do several tasks a number of times to be certain of my findings.

Height: 1.79 m (5'10¾")—ca. 70.; weight: 87.5 kg (193 lbs.)—ca. 93.; *Head circumference: 62.3 cm—greater than 4½ s.d. above mean for age and sex.*

Right hand and foot dominance, with eye dominance less certain (right at time of my examination; mixed when seen by Dr. Mike David).

There is a suggestion of a partial cleft of the upper lip; hard palate somewhat high-arched. Fair dental hygiene with braces on both upper and lower teeth. Lips are somewhat thick and John tends to keep his mouth partially open at all times. No carotid or cranial bruits heard.

There may be a decreased facial expression, though not entirely lacking, and definitely not "masked" at this time. Rate of spontaneous blinking may have been somewhat decreased. There were no vermiform movements of the tongue, nor other adventitious movements suggestive of orobucco-lingual dyskinesin. There was no drooling. There was a fine resting tremor of the "pill-rolling" type of both hands, greater on the left, and often accentuated when John was stressed or concentrated on some task. This will be elaborated on under *Coordination*.

*Skeleton:* Extremely large head as noted above, but lacking the frontal bossing seen with hydrocephalus. Left arm measurably

smaller in mid-upper and mid-forearm than on right; both forearms seem small in comparison to rest of body build. No definite scoliosis. Bilateral pes planus with perhaps somewhat webbed large and second toes. Joints may be somewhat lax.

*Skin:* Generally light-brown as seen in Spanish-Americans, but showing a quite large (if somewhat faint) cafe-au-lait spot over the left pectoral region, and about 10-12 other cafe-nu-lait spots on the torso and right leg, with 3 "doughnut" shaped spots of uncertain significance overlying the left shin. No other cutaneous stigmata, except for some striae around both axillary regions (especially right), probably secondary to weight loss.

*Cranial Nerves:* I—not tested. II—possibly mild myopia, but responses inconsistent. Visual fields intact to confrontation. Fundi normal, with normal retinal vasculature and discs; right optic cup enlarged. "Resting" nystagmus especially appreciated on fundoscopic examination. No phacomas. III, IV, VI—PERLA. Some tendency for right esophoria, but no definite abducens palsy either side. V—intact. VII-XII—intact, including hearing of wristwatch and whispered voice.

*Inter:* Mild, but measurable, hemiatorphy of left arm as noted above. Tone normal (with some hyperlaxity of ankle joints perhaps), and no copwheeling at this time. There is weakness of the flexors of the neck. Despite generally excellent strength and testing resistance at the patient's maximal effort, there is mild but definite weakness of both left extremities, somewhat greater in the upper one.

*Reflexes:* Deep tendon reflexes rated 2/4, with a suggestion of a brisker left patellar jerk, but less definite accentuation of DTR's in the left upper extremity.

Abdominal and cremasteric reflexes physiologic.

Positive Hoffman on right. Bilateral plantar extensor responses, more definite on the left, tested several times and in different ways (Babinski, etc.) because of some tendency to withdrawal. Positive Nyerson's sign (consistent with extrapyramidal dysfunctioning). No other pathologic reflexes.



*Coordination:* Mild tremor and dysmetria in both arms. Patient was rather clumsy in attempting rapid sequential finger-thumb opposition movements, especially on the left. In drinking water from a cup, he was able to do so without spilling, but with the left hand tremor was greater than when cup was held on the right. At the time of drinking, the resting tremor disappeared entirely in the hand *not* holding the cup. Thus there may be a combination of cerebellar dysfunction coupled with mild weakness of the left arm and of extraphramidal "resting" tremor.

Stance normal and no Romberg elicited. Gait somewhat clumsy, with but a hint of dragging or "stiffer" left leg, and probably normal (though not really "freely swinging") associated arm movements. Tandem gait performed marginally well. Walked well on heels as on toes. Hopping on one foot in a small circle done very poorly at this time.

*Sensations:* Intact for touch, position sense, pain, vibration, double simultaneous stimulation, graphesthesia (though responses sometimes slow), stereognosis.

*Mental Status:* As stated, John was cooperative, in fact, tried to please, and seemed to respond to praise. He was oriented as to place and person, but only approximately as to date. He recalled being admitted four months ago (he wasn't sure whether it had been in November or December) because he had trouble getting along, and sometimes other kids made him very angry. He thought his birthday was May 13, and only after asking him if that was right did he correct it to May 14. He knew very little about his family, except that his mother had arthritis. His own history of "spells" was extremely vague.

His speech suggested some mild dysarticulation, but that may be due to the braces. He was not dyspasic. He was able to read some 7th grade material fairly fluently, and understood what he had read. He spelled a few words reasonably well. He was essentially unable to do even very simple arithmetic problems, such as might involve simple monetary transactions (buying, candy, soda pop) without making errors. He had no difficulties with right-left orientation.

I did not pursue the Mental Status examination at length inasmuch as I felt that neuropsychological assessment by Dr. Mike David would be more appropriate and informative.

No thought disorder, hallucinations, or other overtly psychotic manifestations were present.

My overall impression of John's mental functioning was that of relatively mild, global deficits, with IQ in the borderline to possibly mildly retarded range, and with right hemispheric involvement definitely greater than left.

ASSESSMENT: 1. Von Recklingshausen's neurofibromatesis, based on: a) macrocephaly of significant degree, and b) presence of more than 5 cafe-au-lait spots larger than 0.5 cm in diameter.

2. Mild left hemiparesis, probably non-progressive, due to congenital cerebral malformation (megalencephaly), involving right hemisphere more than left.

3. Mild cerebellar dysfunction, probably due to disturbance of fronto-thalamopontine cerebellar pathways (i.e. not primary involvement of the cerebellum as may be seen in this disorder).

4. Borderline to mild mental retardation, consistent with #1 and #2.

5. Mild extrapyramidal side effects, due to phenothiazines, and more pronounced in the left hand, possibly also due to greater sensitivity of this patient to such drugs due to mild dysfunction of extrapyramidal pathways (basal ganglin, etc.) stretched by enlarged III ventricle.

6. Psycho-social and educational deprivation as suggested by history, and the many documents from schools, social workers, psychologists, and psychiatrists available in chart.

7. Adjustment Reaction of Adolescence due to #1, #4, #6, and in reaction to peer pressures and teasing.

8. No evidence of progressive neurologic dysfunction at present (though at greater risk for such due to #1).



RECOMMENDATIONS: 1. X-rays of full spine, hands and feet for possible lesions compatible with von Rocklingshausen neurofibromatosis.

2. Neuropsychological evaluation by Dr. Mike David, neuro-Assessment Center (initiated).

3. Discontinue phenothiatines, if at all possible.

4. If chlordiazepoxide proves not sufficiently effective, mild tranquilization may be achieved with diphenhydraminc (Benadryl) in doses up to 75-100 mg. p.o. q.i.d., or simply on a prn basis not oftener than every 6 hours.

5. Phenobarbital in small doses, e.g. 15 mg. q.i.d., sometimes useful for mild sedation and reduction of anxiety.

6. Continued monitoring with Dr. R. K. Stone of the therapeutic trial of phenytoin with consideration of setting a time limit to the trial and withdrawal thereafter to see if it makes any difference in so-called "blank spells" or "conking out".

7. Individualized Educational programming (especially since his experience at the Fairfield School was reportedly successful).

8. Consideration of transfer to Regional Center care.

9. Failing that, consideration of BYA program.

If there are any further questions, please contact me.

/s/ GERHARD NELLHAUS, M.D.: lns
Neuro-Assessment Center

Date received: February 27, 1980
Date typed: February 29, 1980

**Exhibit 4**

San Francisco Unified School District

Supportive Services
Golden Gate Annex
1512 Golden Gate Avenue
San Francisco, CA 94115

Student Placement Referral

School Identification Number: H008143505
Date: November 14, 1980

Request for Review: Check one only
Exemption ___ Expulsion X Exclusion ___ Part Day ___
Emergency Evaluation Center ___ Home Teaching ___
Unity Middle School ___
Downtown High ___ Opportunity High ___ Other ___

| John Doe | OW | Louise M. Lombard School |
|---|---|---|
| Name of Child | Ethnic Code | School |
| Ungraded [redacted] | 5-14-63 | [redacted] |
| Grade Phone | Date of Birth | Address Zip |
| H008143505 | | [redacted] |
| Student Identification Number | | Parent or Guardian |

Is the student currently in one of the following Special Education Programs?
Please designate: EH___ LDG___ EMH___ OTHER Multi-handicapped
PLEASE ATTACH IEP TO REFERRAL

Was the child assigned by Student Placement? Yes X No
Has the parent been notified of this referral? Yes X No
Total days of suspension this school year Five
Method of parent contact: Conference X Letter X
Telegram ___ Phone ___

Reason for Request: (Document with attachments if necessary) Date of Incident: 11-6-80



Student a danger to himself and other severely handicapped students.

Indicate student's strengths and weaknesses:
N/A Student is multi-handicapped (severely disturbed and retarded).

School Resources Utilized:
1. Conferences (indicate number):
   Teacher-Parent ___ Administrator-Student-Parent X
   Agency ___
   School Site Appeals Board ___ Counseling ___
   Pupil Services ___
   Conclusions and Results:
2. Referrals (indicate number):
   To Counselors ___ To Community Agencies ___
   Pupil Services Worker(s) __ Other Student Placement Committee
3. Attach reports from involved staff:
4. Attach Anecdotal Report (Current semester ONLY)
5. Attach Transcript of Grades and Current Progress Report

Note: All exemptions and part-day assignments for less than a minimum day must have a written request from the parent.
Recommendation by School Staffing Committee:

Request by:

| HENRY A. CARUSO | Henry A. Caruso |
|---|---|
| Principal | Name of Person Preparing Referral |

Note: DISCIPLINARY TRANSFER
The parent or guardian of such student must be notified by telephone, mail or other appropriate means to attend an informal hearing with the principal or his designee regarding the referral to SPC for transferring the student. (Refer to Pupil Service Bulletin #74-75-13) 3/15/79

**Exhibit 5**

BOARD OF EDUCATION POLICY

Article - 5 STUDENTS P 5114

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Section - Student Discipline Date: Sept. 20, 1978

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## I. *GROUNDS FOR DISCIPLINARY ACTION*

### (EDUCATION CODE 48900 SPECIFIC OFFENSE FOR SUSPENSION OR EXPLUSION)

The following shall constitute the grounds on which pupils may be suspended or expelled, provided a proper determination is made that the student committed the misconduct with which he/she is charged. However, these methods of discipline should only be used when other means of correction have failed to bring about proper conduct and when considered appropriate in the the discretion of the teacher and/or principal. However, a pupil may be suspended upon a first offense if the principal determines that the pupil's presence causes a danger to persons or property or a threat of disrupting the educational process. Education Code 48900.2.

A pupil shall not be suspended from school unless the principal determines that the pupil while on school grounds or during an activity off school grounds related to school attendance has:

(A) Caused or attempted to cause damage to school property or stolen or attempted to steal school property.

(B) Caused or attempted to cause damage to private property or stolen or attempted to steal private property.

(C) Caused, attempted to cause, or threatened to cause physical injury to another person except in self-defense.

(D) Possessed, sold, or otherwise furnished any firearm, knife, explosive, or other dangerous object of no reasonable use to the pupil at school or at a school activity off school grounds, as the case may be.

(E) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of any controlled substance, as defined in Section 11007 of the Health and Safety Code, alcoholic beverage, or intoxicant of any kind.

(F) Committed an obscene act or engaged in habitual profanity or vulgarity.

(G) Disrupted school activities or otherwise willfully defied the valid authority of teachers, or administrators.

Suspension shall be imposed only when other means of corrections fail to bring about proper conduct, provided that a pupil may be suspended for any of the reasons enumerated in Section 48900 upon a first offense if the principal determines that the pupil's presence causes a danger to persons or property or is a threat to disrupting the instructional process. (Education Code 48900.2)

*MANDATORY SUSPENSION*

Suspension is mandatory for any student who brings a deadly weapon onto school grounds, as defined by the California Penal Code, Section 3024.

Penal Code Section 3024 Paragraph (f) defines a deadly weapon as any instrument or weapon of the kind commonly known as blackjack, sling shot, billy, sandclub, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a *blade longer than five inches*, any razor with an *unguarded blade* and any metal pipe or bar used or intended to be used as a club.

or if any employee of the San Francisco Unified School District is *attacked, assaulted* or *menaced* (Follow Administrative Regulation R4169 2-22-76.) in all such cases, suspension extension requests shall be put in writing to the *Program Manager, Special Programs and Services.*

*SUSPENSION, STUDENT, GRADES K-5*

It is the policy of the San Francisco Board of Education to prohibit suspensions of students in grades K-5 from the school system (except for those suspensions specifically mandated by law) but rather to utilize alternative learning environments within the school system to deal with discipline and behavior problems.

*SCHOOL ATTENDANCE REVIEW BOARD*: Problems with student attendance must be referred to the school attendance worker. The attendance worker will take the appropriate measures to resolve the problem. Whenever efforts have not been satisfactory in resolving student attendance problems, the attendance worker will refer the case to the *School Attendance Review Board.*



## II. DISCIPLINE AT THE SCHOOL SITE

### A. *PROCEDURE*

The following procedure shall be followed *before* implementation of *any* suspension under this section:

Note: Refer to Policy *P.5114.2* (Amendment to present K-5 policy required)

#### 1. *INFORMAL HEARING FOR STUDENT*

The principal or his/her designee must grant a student at least an informal hearing including:

a. Oral or written notice to the student of the charges against him/her.

b. An explanation of the evidence against him/her if he/she denies the charges, and

c. An opportunity to explain his/her version of the facts. (Goss v. Lopez (1975) 419 U.S. 565)

#### 2. *TIMING OF HEARING*

The hearing should occur as soon as possible following the alleged misconduct. The hearing must take place prior to the suspension except where the principal determines that an emergency situation exists. The term "emergency situation" means a situation determined by the principal to constitute a clear and present danger to the lives, safety or health of pupils or school personnel. In such a case the student may be removed from school immediately, but the necessary notice and hearing must follow as soon as practicable but not later than 72 hours from the time the suspension is ordered.

### B. *STUDENT SUSPENSION BY TEACHER* (Education Code 48901)

A teacher may suspend any pupil from his or her class, for any of the acts enumerated in Section 48900, for the day of the suspension and the day following.

The pupil shall not be returned to the class from which he or she was suspended, during the period of the suspension, without the concurrence of the teacher of the class and the principal.

1. The teacher shall immediately report the suspension to the principal of the school and send the pupil to the principal for appropriate action.

2. The teacher who issues the suspension must telephone the parent during preparation period, recess, or after the close of school to discuss the reasons for suspension. The teacher shall ask the parent or guardian of the pupil to attend a parent-teacher conference regarding the suspension. Whenever practicable, a school counselor shall attend the conference. A school administrator shall attend the conference if the teacher or the parent or guardian so requests.

3. In lieu of suspension a teacher may simply *refer* a student to the school counselor. The teacher may also detain a student after school for not more than one hour at the end of the school day or past departure time of bus transportation provided by the district. However, a student may not be detained in school during recess or noon hour for any reason.

(5 Cal. Adm. Code 307, 352, 353.)

## C. *SUSPENSION BY PRINCIPAL OR DESIGNATED ADMINISTRATOR*

The principal of the school may suspend a pupil from the school for any of the reasons enumerated in Section 48900 for no more than five consecutive school days. (Education Code 48903)

### 1. *ORAL NOTIFICATION TO PARENTS*

Notify the student's parents of suspension immediately by telephone. If unable to contact parent, notify parent by mail the same day. When practicable, notice shall be in the home language of the parents. If the parent or those designated on the "Emergency Card" cannot be reached, the student should be detained in the office for the balance of the school day or returned to class.



### 2. *WRITTEN NOTIFICATION TO PARENTS*

a. Complete the notice of suspension including: name of student, specific act or acts leading to the suspension, date, time, location of alleged acts, duration of suspension, school policy involved, date, time and place of scheduled parent conference, and any other matters pertinent to the suspension. The principal or his designee shall also indicate the previous number of suspensions and the total days suspended for that school year, and the student's racial/ethnic classification.

b. No later than one school day after the suspension, mail the original to the parent. When practicable, the suspension notice shall be in the home language of the parent. One copy should go in student's cumulative folder. One copy is to be mailed to the Area Superintendent.

c. All serious incidents must be included in the "Monthly Report of Serious Incidents at School."

### 3. *PARENT CONFERENCE*

Parents or guardians of any pupil shall respond without delay to any request from school officials to attend a conference regarding their child's behavior while on school grounds or during an activity off school grounds related to school attendance. (Code 48903 (f)

a. On or before the third consecutive school day of any given period of suspension, the parent or guardian of the pupil involved shall be asked to attend a meeting with school officials, at which time the causes, the duration, the school policy involved, and other matters pertinent to the suspension, shall be discussed. When the parent's dominant language is not English, the School District should make an effort to provide an interpreter or to assist the parent in securing an interpreter.

b. At this conference, the designated school official shall make a determination whether to terminate the suspension immediately, continue the suspension to the five (5) day limit, or refer the matter to the Student Placement Committee for further disciplinary action. The decision shall be in writing and shall state the basis on which it was made.

c. If the parent or guardian fails to join in such a conference, the school officials shall send him/her by mail a letter stating the fact that suspension has been implemented and setting forth all other data pertinent to the action.

No penalties may be imposed on a pupil for failure of the pupil's parent or guardian to confer with school officials. Reinstatement of the suspended pupil shall not be contingent upon attendance by the pupil's parent or guardian at such conference. (Education Code 48903 (f)

d. If the parent or guardian is dissatisfied with the findings or recommendation of the principal, he/she may request a meeting before the Superintendent's designee.

D. *PARENT OF PUPIL'S RIGHT TO REQUEST MEETING, SECTION 48904*

If suspension is ordered by a principal pursuant to Section 48903, the pupil or pupil's parent or guardian shall have the right to request a meeting with the Superintendent's designee. Request for meeting shall be made through the site principal.

*PROCEDURE*

(A) The principal shall contact *Area Superintendent* the same day request for meeting is received.

(B) The Area Superintendent/designee will serve as the Superintendent's designee, and a meeting shall be held within three (3) school days of the time such request is received by the principal. (Education Code 48904 (a)

(C) The pupil may designate a representative to be present with him or her at the meeting. *Such representative shall not act as legal counsel for the pupil, unless legal counsel is present to represent the school district.*

(D) The Area Superintendent shall determine if there was sufficient evidence to find that the alleged violation occurred and whether the penalty imposed was appropriate for the violation.



*AT THE MEETING*

1. The Area Superintendent shall review all written documents in the case.

2. The pupil and the pupil's parent, guardian and representative may address the Area Superintendent on the evidence and the appropriateness of the penalty.

3. The Area Superintendent shall render a decision within two (2) school days. If the Area Superintendent determines that no violation occurred, *all records and documentation regarding the disciplinary proceedings and suspension shall be immediately destroyed* and *no information regarding the meeting shall be placed in the pupil's permanent record file or communicated to any person not directly involved in the disciplinary proceedings.* If the Area Superintendent determines that the penalty imposed was inappropriate for the violation, all records and documentation concerning the suspension shall be revised to indicate only the facts leading to the penalty imposed by the Area Superintendent reviewing the case.

e. In the case of any suspension the parent should be requested to accompany the pupil upon his/her return to school, but the pupil shall be readmitted after the fifth day of suspension, regardless of whether accompanied by a parent, unless the period of suspension has been extended by the Student Placement Committee.

f. If the principal or designated school official determines at the conference that the student has attacked, assaulted or menaced a teacher or any employee of the San Francisco Unified School District, he/she should follow procedures set forth in San Francisco Board of Education Administrative Regulation R4159:

(1) Refer the matter immediately to the Student Placement Committee for appropriate action and disposition thereof. Follow all procedures set forth in Section II, D, except that communication with parent or guardian (II, D, 4) must be by certified mail.

(2) Conduct a thorough investigation of the incident, obtain signed statements of possible witnesses, and report the incident to

the San Francisco District Attorney's Office (Youth Guidance Center).

g. If the principal determines at the presuspension hearing that student *may* have violated Penal Code Section 245 (assault with a deadly weapon or force likely to produce great bodily harm against any person) he/she shall immediately notify the police in addition to following the procedures set forth in II, B.

h. If the principal or his designee releases a student to a police officer for the purpose of removing the student from the school site, he/she must take *immediate* steps to notify the student's parent regarding the release to the police officer and the place to which the student is reportedly being taken, and should make a reasonable effort prior to such release.

*HOMEWORK ASSIGNMENTS FOR SUSPENDED STUDENTS (Education Code 48903.5)*

"A suspended pupil *shall* be allowed to complete all assignments and tests missed during the suspension which can be reasonably provided and, upon satisfactory completion, shall be given full credit therefor."

2. *REFERRALS TO STUDENT PLACEMENT COMMITTEE*

If the principal or designated school official believes for any reason that a disciplinary sanction more severe than a five (5) day suspension is appropriate, he/she must refer the matter to the Student Placement Committee within one (1) school day after the scheduled parent conference. All school site resources should be exhausted prior to any referral to the Student Placement Committee. The appropriate Student Placement Committee form should be prepared and forwarded to:

*Program Manager, Special Programs and Services*

A copy of all Student Placement Committee referrals shall be sent to the appropriate Area Superintendent.

Because of the gravity of the action and the necessity to protect the legal rights of the student and members of the School



Department, it is imperative that careful attention be paid to the procedures outlined below:

1. *REASON FOR REQUEST*

Be specific in your request for placement, i.e., change of school, expulsion, emergency evaluation center, etc. Include a statement of what the school staffing committee believes will be in the best interests of the child and the reasons for that particular opinion.

2. *INFORMATION ON THE CHILD*

Fill in completely the portion of the form relating to personal history of the child and designate ethnic code. Indicate the student's strengths and weaknesses, including relationships with the attitudes toward peers and school staff, as well as areas of achievement or difficulties. Include the child's current scholastic and citizenship grades.

3. *DESCRIPTION OF INCIDENT*

Include a narrative description of the incident that let to the action, including time, date, location, injuries to personnel, damage to property, etc. Support with signed statements of any witnesses.

4. *STEPS TAKEN BY THE SCHOOL PRIOR TO REFERRAL TO THE SPC*

Describe the results, conclusions or recommendations of any meetings or conferences held with the pupil and/or parents and guardian. Specify the number and nature of previous referrals and results. Be sure to include statements from the pupil service worker or the resource worker. It *is imperative that communication by the school be made to the parent or guardian before submitting the Student Placement Committee referral.*

III. *DISCIPLINARY ACTION BY THE STUDENT PLACEMENT COMMITTEE*

The Student Placement Committee meets weekly and has responsibility for recommending an abbreviated school day, a special school assignment, an exemption, an expulsion or exclusion, or other measures as a solution to problem students referred.

A. *AUTHORITY*

Upon referral of any disciplinary matter from a school the *Program Manager or the Student Placement Committee* has the authority to (1) terminate the suspension with or without a probationary period of "good behavior." (2) extend the suspension, (3) transfer the student to another school, or (4) recommend expulsion or exclusion to Board of Education. Violation of probation shall be considered a factor in assessing the appropriate penalty for any subsequent offense.

B. *LIMITATIONS ON THE DURATION OF SUSPENSIONS*

1. No pupil shall be suspended from school for more than 20 school days in any one school year. No pupil who is transferred for adjustment purposes may be suspended for more than 10 days following any such reassignment. (Education Code 48903 (g)

2. Notwithstanding the above limitations, the Superintendent or his/her designee may, in his discretion, extend the suspension.

3. In a case where expulsion is being processed by Administrative Hearing Panel, *the Program Manager,* may extend the suspension until such time as a decision has been rendered if the Student Placement Committee determines that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disruption to the instructional process. (Education Code 48903 (1)

C. *PROCEDURE BY THE STUDENT PLACEMENT COMMITTEE FOR FURTHER DISCIPLINARY ACTION*

1. *EXTENSION OF SUSPENSION*

The *Program Manager,* Special Programs and Services, or the Student Placement Committee may extend any suspension subject to the limitations in Section III, B, pending investigation of facts leading to the suspension and determination of the appropriate action to be taken. The principal and other District personnel at the school site shall cooperate fully in this investigation.



2. *TRANSFER*

It is the policy of the San Francisco Unified School District that no student shall be transferred involuntarily as a disciplinary action within legal constraints more than one time.

a. In any case in which the Student Placement Committee is considering a transfer to another school, the student and parent must be notified of the transfer and of the opportunity to request a hearing objecting to the transfer at least one (1) week prior to the expiration of time limits set forth in Section III, B.

b. Such a request must be made by the parent within three (3) days after receipt of the notice of transfer from the Student Placement Committee. The requested hearing must be held within five (5) days after parental request. At the hearing, the student and parent shall be afforded the opportunity to refute the charges by oral or written testimony.

c. The Student Placement Committee should refer to the criteria set forth in San Francisco Board of Education Administrative Regulation R5117.1 in making a decision to transfer a student for disciplinary reasons; i.e., full use should be made of appropriate diagnostic and counseling services, no disruptive pupil shall be transferred unless the transfer would appear to have a reasonable chance of bringing about an improvement in behavior, and the pupil's behavior problem must not be serious enough to endanger others or interfere with the learning process at the recipient school. *Any decision by the Student Placement Committee to transfer a student for disciplinary reasons shall be final.* (See Administrative Regulations of the S.F.U.S.D R5117 and R5117.1 regarding procedure upon transfer.)

d. In the event that the Student Placement Committee decides that it is in the best interest of the child and of the School District to make placement of a student inconsistent with the recommendation of a principal, such principal shall, within two (2) days, have the right to request reconsideration of such decision and a hearing on reconsideration shall be forthwith conducted by the Student Placement Committee.

f. If the principal or designated school official determines at the conference that the student has attacked, assaulted or menaced a teacher or any employee of the San Francisco Unified School District, he/she should follow procedures set forth in San Francisco Board of Education Administrative Regulation R4159:

(1) Refer the matter immediately to the Student Placement Committee for appropriate action and disposition thereof. Follow all procedures set forth in Section II, D, except that communication with parent or guardian (II, D, 4) must be by certified mail.

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"A suspended pupil *shall* be allowed to complete all assignments and tests missed during the suspension which can be reasonably provided and, upon satisfactory completion, shall be given full credit therefor."

D. *REFERRALS TO STUDENT PLACEMENT COMMITTEE*

If the principal or designated school official believes for any reason that a disciplinary sanction more severe than a five (5) day suspension is appropriate, he/she must refer the matter to the



Student Placement Committee within one (1) school day after the scheduled parent conference. All school site resources should be exhausted prior to any referral to the Student Placement Committee. The appropriate Students Placement Committee form should be prepared and forwarded to:

*Program Manager, Special Programs and Services*

A copy of all Student Placement Committee referrals shall be sent to the appropriate Area Superintendent.

Because of the gravity of the action and the necessity to protect the legal rights of the student and members of the School Department, it is imperative that careful attention be paid to the procedures outlined below:

1. *REASON FOR REQUEST*

Be specific in your request for placement, i.e., change of school, expulsion, emergency evaluation center, etc. Include a statement of what the school staffing committee believes will be in the best interests of the child and the reasons for that particular opinion.

2. *INFORMATION ON THE CHILD*

Fill in completely the portion of the form relating to personal history of the child and designate ethnic code. Indicate the student's strengths and weaknesses, including relationships with the attitudes toward peers and school staff, as well as areas of achievement or difficulties. Include the child's current scholastic and citizenship grades.

3. *DESCRIPTION OF INCIDENT*

Include a narrative description of the incident that led to the action, including time, date, location, injuries to personnel, damage to property, etc. Support with signed statements of any witnesses.

4. *STEPS TAKEN BY THE SCHOOL PRIOR TO REFERRAL TO THE SPC*

Describe the results, conclusions or recommendations of any meetings or conferences held with the pupil and/or parents and

guardian. Specify the number and nature of previous referrals and results. Be sure to include statements from the pupil service worker or the resource worker. It *is imperative that communication by the school be made to the parent or guardian before submitting the Student Placement Committee referral.*

## III. *DISCIPLINARY ACTION BY THE STUDENT PLACMENT COMMITTEE*

The Student Placement Committee meets weekly and has responsibility for recommending an abbreviated school day, a special school assignment, an exemption, an expulsion or exclusion, or other measures as a solution to problem students referred.

### A. *AUTHORITY*

Upon referral of any disciplinary matter from a school the *Program Manager or the Student Placement Committee* has the authority to (1) terminate the suspension with or without a probationary period of "good behavior." (2) extend the suspension, (3) transfer the student to another school, or (4) recommend expulsion or exclusion to the Board of Education. Violation of probation shall be considered a factor in assessing the appropriate penalty for any subsequent offense.

### B. *LIMITATIONS ON THE DURATION OF SUSPENSIONS*

1. No pupil shall be suspended from school for more than 20 school days in any one school year. No pupil who is transferred for adjustment purposes may be suspended for more than 10 days following any such reassignment. (Education Code 48903(g)

2. Notwithstanding the above limitations, the Superintendent or his/her designee may, in his discretion, extend the suspension.

3. In a case where explusion is being processed by Administrative Hearing Panel, *the Program Manager,* may extend the suspension until such time as a decision has been rendered if the Student Placement Committee determines that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of



disruption to the instructional process. (Education Code 48903(1)

### C. *PROCEDURE BY THE STUDENT PLACEMENT COMMITTEE FOR FURTHER DISCIPLINARY ACTION*

#### 1. *EXTENSION OF SUSPENSION*

The *Program Manager*, Special Programs and Services, or the Student Placement Committee may extend any suspension subject to the limitations in Section III, B, pending investigation of facts leading to the suspension and determination of the appropriate action to be taken. The principal and other District personnel at the school site shall cooperate fully in this investigation.

#### 2. *TRANSFER*

It is the policy of the San Francisco Unified School District that no student shall be transferred involuntarily as a disciplinary action within legal constraints more than one time.

a. In any case in which the Student Placement Committee is considering a transfer to another school, the student and parent must be notified of the transfer and of the opportunity to request a hearing objecting to the transfer at least one (1) week prior to the expiration of time limits set forth in Section III, B.

b. Such a request must be made by the parent within three (3) days after receipt of the notice of transfer from the Student Placement Committee. The requested hearing must be held within five (5) days after parental request. At the hearing, the student and parent shall be afforded the opportunity to refute the charges by oral or written testimony.

c. The Student Placement Committee should refer to the criteria set forth in San Francisco Board of Education Administrative Regulation R5117.1 in making a decision to transfer a student for disciplinary reasons; i.e., full use should be made of appropriate diagnostic and counseling services, no disruptive pupil shall be transferred unless the transfer would appear to have a reasonable chance of bringing about an improvement in behavior, and the pupil's behavior problem must not be serious enough to endanger others or interfere with the learning process at the

recipient school. *Any decision by the Student Placement Committee to transfer a student for disciplinary reasons shall be final.* (See Administrative Regulations of the S.F.U.S.D. R5117 and R5117.1 regarding procedure upon transfer.)

d. In the event that the Student Placement Committee decides that it is in the best interest of the child and of the School District to make placement of a student inconsistent with the recommendation of a principal, such principal shall, within two (2) days, have the right to request reconsideration of such decision and a hearing on reconsideration shall be forthwith conducted by the Student Placement Committee.

e. In no event shall the Student Placement Committee make placement of a student which is contrary to the recommendation of the principal prior to notification to the principal of such contrary decision and of his/her right to request reconsideration.

f. Provision shall be made for proper introduction of transferred students to a new school so as to facilitate teacher and administrator recognition of problems and avoidance of further difficulties. Such introduction shall include appropriate conferences with student, teacher, parent or administrator in order to outline an adequate program of instruction and student conduct.

3. *APPEALS TO STUDENT PLACEMENT DECISION BY SITE PRINCIPAL*

a. Whenever new evidence can be presented to substantiate original request for review, the case will be re-heard by the Student Placement Committee with the principal presenting new evidence. The Student Placement Committee's decision shall be final.

b. If no new evidence can be presented by the principal to substantiate the original request, then the following steps must be followed.

1. The Principal will request a re-hearing of the case through the Area Superintendent.

2. The re-hearing panel will be selected by the Superintendent or his designee. The chairperson of the Student Placement



Committee will attend such hearing only to present reason for Student Placement Committee decision. The decision of the re-hearing panel shall be final.

4. *RECOMMENDATION OF EXPULSION*

In any case in which expulsion or exclusion is being considered, the following procedure shall be followed (Education Code 48914):

a. The pupil and his/her parent or guardian shall be entitled to a hearing within twenty (20) days of the referral from the school site to determine whether the pupil should be expelled, or within 25 calendar days of the date suspension is ordered, whichever is sooner.

b. Written notice of the hearing shall be forwarded to the pupil and the pupil's parent or guardian at least 10 days prior to the date of the hearing. Such notice shall include: the date and place of the hearing, a statement of the specific facts and charges upon which the proposed expulsion is based, a copy of all the rules of the district adopted pursuant to Section 35291, and the opportunity of the pupil or the pupil's parent ot guardian to: appear in person or to employ and be represented by counsel, inspect and obtain copies of all documents to be used at the hearing, confront and question all witnesses who testify at the hearing, question all other evidence presented, and present oral and documentary evidence on the pupil's behalf, including witnesses. (Education Code 48914 (b).

c. The hearing shall be conducted by the Board or by an impartial administrative panel of three or more certificated employees of the District, none of whom shall be on the staff of the school in which the pupil is enrolled. (Education Code 48914 (d).

d. This hearing shall be closed to the public unless the pupil or his parents request in writing, and at least five (5) days prior to the date of the hearing that the hearing be a public meeting.

e. The hearing may be held irrespective of whether the pupil, parent or guardian chooses to attend. A record of the hearing shall be made. Such a record may be maintained by any means,

including electronic recording, so long as a reasonably accurate written transcription of the proceeding can be made.

f. Technical rules of evidence shall not apply to such hearing, but evidence may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.

9. In any recommendation for expulsion or exclusion, the administrative panel of the Student Placement Committee shall make written findings of fact regarding the student's misconduct as constituting grounds for dismissal and the appropriateness of expulsion or exclusion instead of some less drastic remedy. All findings of fact and recommendations shall be based on the transcript of the hearing. The recommendation of the administrative panel and the written findings of fact shall be forwarded to the Board of Education, with a copy to the Program Manager, a copy to the Area Superintendent, a copy to the Legal Adviser, and a copy to the pupil and parent or guardian within five calendar days of the date on which the hearing was commenced. Within three calendar days following such hearing, the administrative hearing panel shall determine whether to recommend expulsion to the board. If the decision is for a rejection of expulsion, the expulsion proceedings shall be terminated and the pupil shall be immedately reinstated and allowed to return to classroom instruction upon which such pupil had been in attendance prior to the suspension or to any other instructional program by mutual agreement among the principal and parent or guardian and pupil.

If the administrative panel recommends expulsion, the parent shall be notified that final action will be taken by the Board of Education and that the parent may request in writing at least five (5) days prior to the hearing that it be a public meeting.



## IV. *ACTION BY THE GOVERNING BOARD OF THE SCHOOL DISTRICT*

### A. *FINAL DECISION REGARDING EXPULSION OR EXCLUSION*

1. The final decision on expulsion or exclusion shall be made by the governing board of the School District at a public meeting. The name of the student and the school attended shall not be disclosed unless the parent requests otherwise in writing at least five (5) days in advance of the meeting. The pupil, parent, guardian or representative may address the governing board on the evidence and on the appropriateness of the penalty. The decision of the governing board must be supported by substantial evidence.

2. The Board of Education shall accept the findings of fact and recommendations of the administrative panel of such findings of fact and recommendations call for a rejection of expulsion. (Education Code 48914 (d).

3. The Board of Education *may* reflect the findings of fact and recommendations of the Student Placement Committee if such findings of fact and recommendations call for expulsion. (Education Code 48914 (d).)

A decision of the governing board whether to expel a pupil shall be made within 35 calendar days of the date expulsion is recommended by a principal pursuant to subdivision (a) of Section 48904.5 or within 40 calendar days of the date suspension is ordered for the offense, whichever is sooner; unless the pupil or pupil's parent or guardian requests in writing that such decision be postponed.

4. Written notice of any decision to expel or exclude shall be sent by governing board to the pupil and parent, accompanied by notice of the right to appeal such expulsion to the County Board of Education. (Education Code 48914 (g).)

### B. *SUSPENDING THE ENFORCEMENT OF EXPULSION*

A governing board that has voted to expel a pupil may suspend the enforcement of such expulsion for a period of not more than

one full semester in addition to the balance of the semester in which the expulsion occurs and may, as a condition of such suspended action, assign the pupil to a school, class, or program which is deemed appropriate for rehabilitation of the pupil. Such assignment may be a community-centered classroom and may include experiences for the pupil as an observer or aide in governmental functions, as an on-the-job trainee, and as a participant in specialized tutorial experiences or individually prescribed educational and counseling programs. Such prgrams shall include an individualized learning program to enable the pupil to continue academic work for credit toward graduation.

At the conclusion of the designated period during which an expulsion action is suspended, the governing board shall: (1) reinstate a pupil who has satisfactorily participated and permit the pupil to return to the school of former attendance or voluntarily to attend other programs offered by the District; or (2) if a pupil's conduct has been unsatisfactory, enforce the expulsion action previously voted by the Board.

If the pupil is reinstated, the Board may also take action to expunge the record of expulsion. (Education Code 48907.5)

C. *REINSTATEMENT OF EXPELLED STUDENTS*

1. Any student who has been expelled from school may be reinstated by action of the Board of Education upon recommendation of the Student Placement Committee.

2. All expulsions shall be reviewed and evaluated by the Student Placement Committee within six (6) months following the action by the governing board and upon such review, the Student Placement Committee shall make recommendations to the governing board for further action as appropriate. This provision shall not be interpreted to preclude subsequent review and evaluation of any expulsion action.

3. The recommendation of the Student Placement Committee shall be based on an evaluation of the student's adjustment during the period of expulsion. The Student Placement Committee shall secure and review all the necessary information and materials related to the student's adjustment. An informal meeting with the student and parent shall be held before any recommendation is made to the governing board.



4. If the pupil is reinstated, the Board of Education may take action to expunge the record of the expulsion action.

V. *APPEAL OF EXPULSION TO THE COUNTY BOARD OF EDUCATION*

A. The student or parent may appeal an expulsion by sending written notice to the County Board of Education within thirty (30) days of the date of decision by governing board to expel. (Education Code 48915.)

B. The County Board of Education shall hear the appeal of an expulsion in Executive Session unless the appellant requests in writing, at least five (5) days prior to the date of the hearing, that the hearing be a public meeting. (Education Code 48916.)

C. The appeal shall be determined on the record of the expulsion hearing. The review by the Board of Education shall be limited to a determination of (1) whether the Administrative Panel and the governing board have proceeded without or in excess of their jurisdiction, (2) whether there was a fair hearing before the Administrative Panel of the Student Placement Committee and adequate review before the governing board of the School District.

D. If the County Board of Education finds that there has been a denial of due process, the Board may (1) reconsider the matter anew and render a new decision, (2) grant a new hearing before the Administrative Panel of the Student Placement Committee.

E. In any event, the County Board of Education shall enter a final order affirming or reversing the initial decision to expel. If the order calls for a reversal of the expulsion, the Board may take procedures to expunge from the record of the student any references to the expulsion action and such expulsion shall be deemed not to have occurred. Written notice of the final order shall be forwarded to the student and parent. (Education Code 48919.)

## VI. *EXEMPTIONS AND EXCLUSIONS*

Request for exemption from attendance in the public schools may be made in writing by the parent. Exemptions will be forwarded to the Program Manager for investigation and approval.

Reasons for for exemption. The following types of students may be exempted:

—Children whose physical or mental condition is such as to prevent or render inadvisable their attendance at school (Education Code 48221).

—Children attending private schools (Education Code 48222).

—Children instructed by tutors (Education Code 48224).

—Students assigned to a vocational course in a place of employment (Education Code 48227, 48228).

—Students exempted from Continuation School by the Board of Education (Education Code 48410).

Exemption shall not be utilized where disciplinary sanctions are appropriate.

### *EXCLUSION OF STUDENTS*

Definition. Children who may be excluded by action of the Board of Education from attendance at regular schools are those of filthy or vicious habits, those suffering from contagious or infectious diseases, and whose physical or mental disability is such as to cause their attendance to be inimical to the welfare of other pupils (Education Code 48211, 48212).

Recommendations for exclusion. Recommendations for exclusions may be made by the principal to the Student Placement Committee. A recommendation for exclusion will be made to the Board of Education by the Administrative Hearing Panel after an investigation has been made.

Parent consultation. In all cases where exclusion of a student is being considered, the child's parents shall be consulted. If the parent is not in agreement with the recommendation for exclusion, the student and his parents may request that the case be reviewed by the Administrative hearing Panel. Following any such request, procedures set forth for explusion shall apply.



## VII. *PARENT OR PUPIL'S RIGHT TO HAVE ACCESS TO THE PUPIL'S RECORDS*

Parent/pupil have the right to access of all records in accordance with Board of Education Policy 5160 Guidelines Regarding Student Records K-12 adopted August 17, 1977.

### HISTORY/AUTHORIZATION

Authorized by Resolution No. 39-12Sp1 (substitute motion for Resolution No. 86-27 Sp7) as amended by #99-12A7 and A8.

**Exhibit 6**

[LETTERHEAD]

Nobember 14, 1980

Mr. James Cassassa,
940142 Compliance Office
San Francisco Unified School District
135 Van Ness Avenue
San Francisco, CA 94102

Dear Mr. Cassassa,

This morning I attended a meeting at Louise Lombard School with Mr. Henry Caruso along with my client, John Doe. At that meeting, we were informed that Mr. Caruso was referring Doe to the Student Placement Committee for expulsion from school, following a 5-day suspension which he completed today.

Doe has been identified for many years as an Educationally Handicapped student, and was placed at Louise Lombard this Fall under that program. I suggested to Mr. Caruso that, as such, Doe should not be referred for expulsion, but rather that an IEP meeting should be convened to discuss and formulate a change in placement.

While Mr. Caruso acknowledged that Louise Lombard is not an appropriate placement for Doe, he determined that referral to the Student Placement Committee was in order because of Doe's behavior.

I would refer you to the Federal and State provisions which require an IEP in order to change the placement of a special education student, and the line of cases emanating from *Stuart v. Nappi, P-1 v. Shedd* and *S-1 v. Turlington* which provide that the special education administrative process replaces the disciplinary procedures described by either State or local Board of Education policies, for students eligible for special education. Therefore, we ask that Doe be allowed to remain in his current placement at Louise Lombard until an IEP meeting can be held to discuss and decide upon an appropriate program for him, to be implemented within 20 school days after the determination of such a program



by the IEP Committee. Please let me know as quickly as possible whether you can arrange for the IEP meeting to be held in lieu of the referral to the Student Placement Committee.

Cordially,

Sheila Brogna

Attorney for John Doe

cc: Dr. Robert Alioto, Superintendent, SFUSD
Mr. Robert Figone, Chairperson, SPC
Mr. Henry Caruso, Louise Lombard School

United States District Court

Northern District of California

No. C-80-4270-MHP

John Doe,
Plaintiff,

vs.

William Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, Individually and in Their Capacities of Members of the San Francisco Unified School District Board of Education; Robert Alioto, Individually and in His Capacity as Superintendent of the San Francisco Unified School District; Robert Figone, Individually and in His Capacity as Chairperson of the Student Placement Committee of the San Francisco Unified School District; Henry Caruso, Individually and in His Capacity as Principal of the Louise Lombard School in the San Francisco Unified School District; Wilson Riles, Individually and in His Capacity as the California State Superintendent of Public Instruction,
Defendants.

## PRELIMINARY INJUNCTION

[Filed Dec. 12, 1980]

Upon consideration of all pleadings, memoranda and exhibits filed in this matter, and of the evidence and argument presented at the hearings held in connection with the temporary restraining order previously issued by this Court and at the hearing on the motion for preliminary injunction, the Court finds as set forth below:

1. Great injury and irreparable harm to plaintiff will result if he is prevented from remaining in his placement at the Louise Lombard School while efforts are being made to find a new placement for him consistent with the Individualized Education Program meeting held on December 1, 1980, and with any further



proceedings that shall be held in connection with developing an appropriate I.E.P. for plaintiff.

2. Plaintiff has demonstrated that there is a strong likelihood that he will succeed on the merits, in that:

(a) It appears to the Court that the defendants did not comply with the requirements of 20 U.S.C. § 1415 and the regulations promulgated thereunder before attempting to change the placement of the plaintiff, and exceeded the suspension provisions of the California Education Code, §§ 48900 et seq.

(b) There is a strong likelihood that plaintiff can establish that 20 U.S.C. § 1415(e)(3), 45 C.F.R. § 121a.513(a), and California Education Code § 56505(d), as amended by Chapter 797 of the 1980 Regular Session (providing that "[d]uring the pendency of the hearing proceedings [to review an I.E.P.] . . . the pupil shall remain in his or her present placement unless the public agency and the parent agree otherwise"), supersede any contrary provision of California statutes and regulations, including sections 3308(m) and 3308.5 of Title V of the California Administrative Code and any other sections which purport to allow interim exclusion of a child from a placement.

(c) Even insofar as suspension (Cal. Educ. Code §§ 48900-48904) and/or exclusion (Cal. Educ. Code §§ 48210-48214) proceedings may apply to children with disabilities, it appears to the Court that defendants did not comply with those provisions, in that

(1) plaintiff's suspension lasted longer than the five-day period provided by statute;

(2) there is no provision for extending a suspension pending exclusion proceedings, and any such provision would be likely to conflict with the statutes cited above, prohibiting interim changes of placement; and

(3) no notice of the district's intent to exclude plaintiff was given *prior* to his removal from Louise Lombard, contrary to the requirements of Cal. Educ. Code § 48213.

3. The hardships to defendant and the public interest in maintaining a safe and secure educational environment for other children are not insubstantial. However, those hardships and interests must be viewed in the light of a Congressional mandate for providing appropriate educational placement for all handicapped children, and for retaining children in their existing placement while a new placement is being sought pursuant to the considerations and procedures required by law for changes in placements or in Individualized Education Programs. Moreover, plaintiff has taken steps to cooperate with the school in reducing the danger he presents to other children (see Agreement Between [Plaintiff] and Andre Zanger [his psychiatrist], filed December 5, 1980); the school has the resources available to provide alternative programs within the present placement until an appropriate placement is found or an agreement is reached between the appropriate agency and plaintiff's mother for an alternative interim placement; plaintiff was originally accepted by the present placement despite his past history; and defendants have the ability to suspend plaintiff, if necessary, in accordance with the provisions of the California Education Code. Considering all of these factors, the Court finds that the balance of hardships and the public interest weigh in favor of allowing plaintiff to remain at Louise Lombard pending a proper change of placement.

4. Administrative remedies must be exhausted before suit is filed to review a final placement or change of placement. However, the manner in which plaintiff was removed was accomplished without a change of placement or other reviewable determination. Plaintiff seeks and is granted here only interim relief until proper procedures are complied with, including administrative review, if sought. There is no administrative remedy which must be exhausted before plaintiff may obtain this interim relief.

For all of the foregoing reasons,

IT IS HEREBY ORDERED that defendants are enjoined from excluding plaintiff in any way from attending his regularly assigned classes and his educational placement at The Louise Lombard School, San Francisco, California unless and until either



(a) an agreement is reached between the appropriate agency and plaintiff's mother for an alternative interim placement, or

(b) a new placement is found pursuant to plaintiff's Individualized Education Program, and all administrative or judicial review of the Program and/or the new placement has been completed. This order is without prejudice to defendants' authority to suspend plaintiff according to the provisions of the California Education Code, including the time limits on suspensions imposed thereby.

IT IS FURTHER ORDERED that defendants shall comply in good faith with the spirit as well as the letter of this injunction, and of their legal obligation to retain plaintiff at The Louise Lombard School until a satisfactory alternative is found. This Court will not invade the province or discretion of skilled, experienced educational professionals in determining what measures will be necessary to ensure that plaintiff can remain at Louise Lombard while minimizing the threat of danger to other children; it is expected, however, that defendants will take appropriate steps to develop and implement such measures so as to meet the educational and security needs of each child at the school including those of the plaintiff.

DATED: December 12, 1980.

MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

Sheila Brogna
Susan Spelletich
Legal Services for Children, Inc.
149 Ninth Street, Top Floor
San Francisco, California 94103
(415) 863-3762
Attorneys for Plaintiff

In the United States District Court
for the
Northern District of California

Civil No. C 80 4270 MHP

John Doe,
Plaintiff,

vs.

Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as Members of the San Francisco Unified School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, individually and in his capacity as Chairperson of the Student Placement Committee of the San Francisco Unified School District; Henry Caruso, individually and in his capacity as Principal of the Louise Lombard School in the San Francisco Unified School District; Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruction,
Defendants.

# FIRST AMENDED COMPLAINT CIVIL RIGHTS

[Filed Dec. 31, 1980]

## *INTRODUCTORY STATEMENT*

1. This action arises under the provisions of The Education of the Handicapped Act, as amended, 20 U.S.C. § 1401 et seq., and the regulations promulgated thereunder; under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the regulations promulgated thereunder; under 42 U.S.C. § 1983; and



under the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Plaintiff seeks declaratory and injunctive relief against defendants for denial of his rights under The Education of the Handicapped Act to receive a free appropriate public education in the least restrictive educational environment, to have all changes of educational placement effectuated in accordance with the procedures prescribed in the Act, and to remain in his currently assigned placement until resolution of any administrative and judicial proceedings pursuant to the Act. Plaintiff seeks relief from actions of the defendants that have excluded him from participating in a program which receives federal financial assistance solely by reason of his handicap, in violation of § 504 of The Rehabilitation Act of 1973. Plaintiff also seeks relief from actions of the defendants under color of state law that deprive him of rights, privileges, and immunities guaranteed by the Fourteenth Amendment to the United States Constitution and deprive him of his civil rights guaranteed by The Education of the Handicapped Act and The Rehabilitation Act of 1973 in violation of 42 U.S.C. § 1983.[1]

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[1] The Complaint in this action was filed November 24, 1980. Between that date, and the date of filing this First Amended Complaint, certain developments have occurred. The first hearing on plaintiff's application for a temporary restraining order was held on November 24, 1980. At that hearing, defendants agreed to cancel the scheduled expulsion/exclusion hearing concerning plaintiff. The Court ordered defendants to provide plaintiff with a home teacher, and to convene an IEP meeting. The IEP meeting concerning plaintiff was held December 1, 1980. The second hearing on plaintiff's application for a temporary restraining order was held December 1, 1980. The Court issued a T.R.O. on December 2, 1980, which ordered defendants to allow plaintiff to return to his regular classes at Louise Lombard School. A hearing on plaintiff's request for a preliminary injunction was held on December 8, 1980. The Court issued a preliminary injunction on December 12, 1980, which ordered defendants to allow plaintiff to attend his regular classes at Louise Lombard School, and requires defendants to take any appropriate steps to insure that plaintiff is able to remain at Louise Lombard School.

*JURISDICTION*

3. Plaintiff, as a student identified as handicapped, seeks to enforce the rights conferred on him by The Education of the Handicapped Act. This Act confers jurisdiction on this Court over plaintiff's claim of defendants' noncompliance with the procedural requirements of the Act regardless of the amount in controversy, 20 U.S.C. § 1415(e)(4).

4. This action also seeks to redress the deprivation under color of state law of rights, privileges, and immunities guaranteed to plaintiff as a handicapped person and student by the United States Constitution and the anti-discrimination provision of The Rehabilitation Act of 1973, 29 U.S.C. § 794. Therefore, jurisdiction is also conferred on this Court by 28 U.S.C. § 1343(3) and (4).

5. This action arises under the Constitution and laws of the United States, as set forth herein, and the amount in controversy exceeds $10,000, exclusive of interest and costs. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331.

6. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. § 2201 and § 2202 and by Federal Rules of Civil Procedure 57 and 65 relating to declaratory judgments and injunctions.

*PLAINTIFF*

7. John Doe, a seventeen-year-old minor, is a resident of San Francisco, California, and a student in the San Francisco Unified School District (SFUSD). Plaintiff is an educationally handicapped child eligible for special education and related services pursuant to The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and the regulations promulgated thereunder, as implemented by California Education Code § 56000 et seq. Plaintiff is handicapped individual within the meaning of § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiff has been defined as educationally handicapped for several years. John is defined as a multi-handicapped child pursuant to federal and California law with a neurological deficit and significant emotional problems in his Individualized Education Program (IEP) dated April 9, 1980. Plaintiff's currently assigned educational placement is Louise Lombard School in the San Francisco Unified School District. A true copy of John's IEP is attached as Exhibit 1 and incorporated herein by reference.



*DEFENDANTS*

8. Wilson Riles is the California State Superintendent of Public Instruction and as such is responsible at the state level for administering the provisions of Part 30 of the California Education Code governing special education, California Education Code § 56120. Defendant Riles is responsible for administering California Education Code provisions that implement plaintiff's right to a free appropriate public education pursuant to 20 U.S.C. § 1401 et seq., and procedural safeguards of 20 U.S.C. § 1415. Defendant Riles is responsible for insuring that each California local school district is in compliance with 20 U.S.C. § 1401 et seq., and the federal regulations promulgated thereunder.

9. Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom constitute the San Francisco Unified School District Board of Education. The SFUSD Board of Education has ultimate responsibility for establishing policies for the operation of the SFUSD, including policies concerning the provision of publicly-funded special education programs for students in the SFUSD, and for the exclusion or expulsion of students from the SFUSD.

10. Robert F. Alioto is the Superintendent of the San Francisco Unified School District, chosen and appointed by the SFUSD Board of Education, to carry through procedures created by the Board or mandated by law, including operation of the special education programs in the SFUSD. Defendant Alioto is responsible for insuring that handicapped students in the SFUSD are treated in compliance with 20 U.S.C. § 1401 et seq., as implemented by California Education § 56000 et seq., and in compliance with 29 U.S.C. § 794.

11. Robert Figone is the Chairperson of the Student Placement Committee of the SFUSD. The Student Placement Com-

mittee, through its Chairperson, processes disciplinary referrals of students from SFUSD school principals and recommends expulsion or exclusion to the Board of Education. Defendant Figone is responsible for administering the California Education Code disciplinary provisions and SFUSD disciplinary policies, as Superintendent Alioto's designee.

12. Henry Caruso is the principal of Louise Lombard School in the SFUSD, and as such is responsible for the operation and administration of Louise Lombard School in compliance with SFUSD Board of Education policies and state and federal law. Defendant Caruso is responsible for supervision of the educational programs of multi-handicapped students at Louise Lombard School.

13. All defendants, and their legal successors in office, are sued in their individual as well as their official capacities.

*FACTUAL ALLEGATIONS*

14. John was assigned to Louise Lombard School in the SFUSD on June 19, 1980, in conformance with his Individualized Education Program (see Exhibit 1, page 1). John attended classes at this school during the fall of 1980.

15. On November 6, 1980, plaintiff was involved in an incident with another student at Louise Lombard School. As a result he was suspended from school for five days. A true copy of the Notice of Suspension is attached as Exhibit 2 and incorporated herein by reference.

16. The behavior of plaintiff that resulted in his suspension is a manifestation of his educational handicap that is addressed in his IEP. His behavior was totally in keeping with, and caused by, his handicap as described in his IEP: neurological deficit and significant emotional problems. The SFUSD and the staff at Louise Lombard School were on notice of John's behaviorial and emotional problems through IEP: and also through a report of comprehensive neurological assessment by Napa State Hospital which is included in John's school file at Louise Lombard School and available to all members of the staff. A true copy of the Napa



State Hospital report, dated February, 1980, is attached as Exhibit 3 and incorporated herein by reference.

17. On November 14, 1980, John was referred to the SFUSD Student Placement Committee for expulsion or exclusion by Henry Caruso, the principal of Louise Lombard School. The basis for the referral was the incident that occurred on November 6, 1980. A true copy of the Student Placement Committee Referral is attached as Exhibit 4 and incorporated herein by reference.

18. Defendant Caruso requested that Plaintiff either be expelled or excluded from the SFUSD pursuant to California Education Code §§ 48210-48214, and 48900 et seq., and pursuant to SFUSD Board of Education Policy 5114. A true copy of SFUSD Board of Education Policy 5114 is attached as Exhibit 5 and incorporated herein by reference.

19. On November 14, 1980, a meeting was called by Defendant Caruso at which time he informed plaintiff that he was referring plaintiff to the Student Placement Committee for expulsion from the SFUSD. Plaintiff objected to this action, and stated his desire to remain at Louise Lombard School.

20. Plaintiff, through counsel, protested his referral to the Student Placement Committee for expulsion in a letter to the SFUSD, and asked instead that special education administrative procedures be initiated concerning him. No response to this letter was received by plaintiff or his attorney prior to initiation of these proceedings. A true copy of this letter is attached as Exhibit 6 and incorporated here by reference.

21. On November 17, 1980, plaintiff and his mother were notified that a meeting of the Student Placement Committee would be held on November 25, 1980, to consider plaintiff's expulsion or exclusion from the SFUSD.

22. Against the objections of plaintiff and his mother, plaintiff was not allowed to attend his classes at Louise Lombard School after November 6, 1980, nor was plaintiff provided with any alternative educational placement or program until after initiation of this action.

## *LEGAL FRAMEWORK OF PLAINTIFF'S CLAIM*

### *The Education of the Handicapped Act*

23. The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., as amended, and the regulations promulgated thereunder, 34 C.F.R. Part 121a, detail specific rights to which handicapped children are entitled. Included among these are:

(a) The right to a "free and appropriate public education," 20 U.S.C. § 1401(16) and (18); 34 C.F.R. § 121a.1, § 121a.4, §121a.14;

(b) The right to remain in the current educational placement during any proceeding related to the placement of the child or the provision of a free appropriate public education, 20 U.S.C. § 1415(d)(3); 34 C.F.R. § 121a.513;

(c) The right to education in the "least restrictive environment," 20 U.S.C. § 1412(5)(B); 20 U.S.C. § 1414(a)(1)(C)(iv); 34 C.F.R. § 121a.132, § 121a.227, § 121a.550-556;

(d) The right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, and 34 C.F.R. § 121a.500-514.

24. States are required by 20 U.S.C. § 1412(4) and 20 U.S.C. § 1414(a)(5) to insure that each local educational agency in the State establishes and maintains an individualized education program for each handicapped student. The local public educational agency is held responsible by 34 C.F.R. 121a.343 for initiating and conducting meetings for the purpose of developing, reviewing and revising a handicapped child's Individualized Education Program.

25. State and local educational agencies are required by 20 U.S.C. § 1415(a) and 34 C.F.R. 121a.501 to establish and maintain a system of procedural safeguards with respect to the provision of a free appropriate public education to handicapped students by these agencies. These safeguards include:

(a) Written notice to the parents of a handicapped child a reasonable time before the public agency proposed to change the educational placement of the child or the provision of a free



appropriate public education of the child, 20 U.S.C. § 1415(b)(1)(C) and 34 C.F.R. § 121a.504;

(b) This written notice must include a full explanation of all the procedural safeguards available to the parents and a description of the action proposed, an explanation of why the agency proposes to take the action, and a description of any options the agency considered and the reasons why those options were rejected, 20 U.S.C. § 1415(b)(1)(D) and 34 C.F.R. § 121a.505;

(c) The parents of the child must be provided with an opportunity for an impartial due process hearing on any proposal to change the educational placement of the child or the provision of a free appropriate public education to the child, 20 U.S.C. § 1415(b)(2) and 34 C.F.R. 121a.506-512;

(d) During the pendency of any administrative or judicial proceeding concerning the child's placement or program, the child must remain in his then current educational placement unless the public agency and the parents of the child agree otherwise, 20 U.S.C. § 1415(e)(3) and 34 C.F.R. 121a.513.

26. The SFUSD, directly and through the California State Department of Education, receives Federal financial assistance under the Education for the Handicapped Act, which is utilized by the schools in the SFUSD, including Louise Lombard School, for services to handicapped children.

### *California Education Code Provisions Implementing the Education of the Handicapped Act*

27. The federal Education of the Handicapped Act requires states to meet the above-described requirements in order to qualify for financial assistance for public education for the handicapped. California law implementing this federal law is found in California Education Code § 56000 et seq. (Statutes 1980, Chapter 797, effective July 28, 1980).

28. California law provides to each handicapped student "an education appropriate to his needs in publicly supported programs . . . ", Education Code § 56001(a).

29. The California Education Code places certain requirements on each local school district concerning handicapped students, in compliance with the federal Education for the Handicapped Act, including:

(a) Each school district must initiate and conduct meetings for the purposes of developing, reviewing and revising the IEP of each individual with exceptional needs, Education Code § 56340;

(b) An IEP team must meet whenever the pupil's placement, instruction, services, or any combination thereof as specified in the IEP is to be developed, changed or terminated, Education Code § 56343(b);

(c) Specific due process hearing procedures apply whenever there is a proposal to change the educational placement of a child, or the provision of a free appropriate education to a child, Education Code § 56501;

(d) These due process procedures include the right to a fair and impartial administrative hearing at the state level before a person knowledgeable in the laws governing special education and administrative hearings, Education Code § 56501(b)(3);

(e) During the pendency of the hearing proceedings the pupil is entitled to remain in his present placement, Education Code § 56505(d). Certain limited exceptions are provided by administrative regulation if the School district follows procedures for removal of a student from his placement in accordance with Title 5, California Administrative Code § 3308. The San Francisco Unified School District did not follow those procedures in plaintiff's case.

*Section 504 of The Rehabilitation Act of 1973*

30. Section 504 of The Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the regulations promulgated thereunder, 34 C.F.R. Part 104, prohibit the exclusion, solely by reason of his handicap, of any otherwise qualified handicapped individual in the United States, from participating in, from the benefits of, or from being subject to discrimination under any program or activity receiving Federal financial assistance.



31. The SFUSD, as a result of receiving federal financial assistance, is subject to the requirements of 29 U.S.C. § 794.

32. The SFUSD must provide a free appropriate public education to each qualified handicapped person within the SFUSD, regardless of the nature or severity of the person's handicap, 34 C.F.R. § 104.33.

33. The SFUSD must conduct an evaluation of a handicapped student before making any significant change in the student's placement, 34 C.F.R. § 104.35.

34. The SFUSD must follow certain procedural safeguards when taking any action regarding the identification, evaluation, or educational placement of handicapped students, including notice, an opportunity to examine records, an impartial hearing, and a review procedure, 34 C.F.R. § 104.36.

*FIRST CAUSE OF ACTION*

35. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., by denying plaintiff his right to a free and appropriate public education in the least restrictive environment by excluding him from his educational placement.

*SECOND CAUSE OF ACTION*

36. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., by changing plaintiff's educational placement and the provision of a free appropriate public education to him in violation of the procedural requirements in 20 U.S.C. § 1415. Defendants failed to provide plaintiff and his parent with proper notice of the proposed change of placement and change in the provision of a free appropriate public education, which should have included a description of all procedural safeguards which The Education of the Handicapped Act requires, a description of options the school district considered, and the reasons they were rejected.

*THIRD CAUSE OF ACTION*

37. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1415(e)(3) and 34 C.F.R. § 121a.513, by denying plaintiff his right to remain in his current educational placement during proceedings relating to plaintiff's placement and proceedings relating to the provision of a free appropriate public education by excluding plaintiff from his educational placement.

*FOURTH CAUSE OF ACTION*

38. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., as implemented by California Education Code § 56000 et seq., by failing to convene an IEP team meeting prior to changing plaintiff's placement, instruction and services as specified in plaintiff's IEP, as required by California Education Code § 56343.

*FIFTH CAUSE OF ACTION*

39. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by denying plaintiff his right, regardless of the nature or severity of his handicap, to a free appropriate public education, by excluding plaintiff from his educational placement.

*SIXTH CAUSE OF ACTION*

40. Defendants have violated § 504 of The Rehabilitation Act of 1972, 29 U.S.C. § 794, by excluding plaintiff from his educational placement and the SFUSD solely by reason of his handicap.

*SEVENTH CAUSE OF ACTION*

41. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by excluding plaintiff from his educational placement and the SFUSD, which is a significant change in placement, without first conducting an evaluation of plaintiff as required by 34 C.F.R. § 104.35.



*EIGHTH CAUSE OF ACTION*

42. Defendants, acting under color of state law, have deprived plaintiff of rights, privileges and immunities, and denied him his civil rights, guaranteed him by The Education of the Handicapped Act, in violation of 42 U.S.C. § 1983, in that defendants excluded plaintiff from his educational placement in violation of the procedural requirements of the Education of the Handicapped Act and deprived him of his right to a free appropriate public education in the least restrictive environment which is guaranteed to plaintiff by The Education of the Handicapped Act, by acting pursuant to exclusion and expulsion provisions of the California Education Code and the regulations promulgated thereunder in Title 5, California Administrative Code.

*NINTH CAUSE OF ACTION*

43. Defendants, acting under color of state law, have deprived plaintiff of rights, privileges and immunities, and denied him his civil rights, guaranteed him by § 504 of The Rehabilitation Act of 1973 in violation of 42 U.S.C. § 1983, in that defendants excluded plaintiff from his educational placement in violation of the requirement of § 504 that an evaluation of plaintiff first be conducted, and deprived plaintiff of his right to a free appropriate public education regardless of the nature or severity of his handicap which is guaranteed to plaintiff by Section 504, by acting pursuant to exclusion and expulsion provisions of the California Education Code and the regulations promulgated thereunder in Title 5, California Administrative Code.

*TENTH CAUSE OF ACTION*

44. Defendants have deprived plaintiff of his due process rights guaranteed him by the Fourteenth Amendment to the United States Constitution by excluding plaintiff from his educational placement and the SFUSD in violation of the procedural requirements of The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and the regulations thereunder, as implemented by California Education Code § 56000 et seq., and in

violation of Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations thereunder.

*ELEVENTH CAUSE OF ACTION*

45. Defendants, acting under color of state law and in reliance upon California Education Code §§ 48210-48214, have deprived plaintiff of rights, privileges and immunities and denied him his civil rights in violation of 42 U.S.C. § 1983, by applying to plaintiff, an educationally handicapped child, the standard of California Education Code § 48212 which purports to allow exclusion from a school district any child whose physical or mental disability is such as to cause his attendance to be inimical to the welfare of other pupils, which directly conflicts with the standards of The Education of the Handicapped Act, 29 U.S.C. § 1401 et seq., identifying educationally handicapped children.

*TWELFTH CAUSE OF ACTION*

46. Defendants, acting under color of state law and in reliance upon California Education Code §§ 48210-48214, have deprived plaintiff of rights, privileges and immunities and denied him his civil rights in violation of 42 U.S.C. § 1983, by applying to plaintiff, an educationally handicapped child, the standard of California Education Code 48212 which purports to allow exclusion from a school district any child whose physical or mental disability is such as to cause his attendance to be inimical to the welfare of other pupils, which directly conflicts with 29 U.S.C. § 794 which prohibits the exclusion of a handicapped individual solely on the basis of his handicap.

*THIRTEENTH CAUSE OF ACTION*

47. Defendants will continue to violate Federal law and the United States Constitution as herein described, unless they are prohibited from so acting by this Court, because due to the nature of plaintiff's handicap the behavior by him which is the basis for defendants' actions is likely to recur.



*PRAYER FOR RELIEF*

WHEREFORE, plaintiff respectfully prays that this Court:

1. Enjoin defendants from conducting a hearing to expell or exclude plaintiff from the San Francisco Unified School District;

2. Order defendants to immediately convene an IEP team meeting to review plaintiff's educational placement, instruction and services;

3. Declare that defendants must follow the procedures required by 20 U.S.C. § 1401 et seq., and the regulations thereunder, as implemented by California Education Code § 56000 et seq., whenever a proposal is made to change the educational placement, instruction or services provided to plaintiff and before the educational placement, instruction or services to plaintiff are changed, and permanently enjoin defendants, their agents and employees from violating 20 U.S.C. § 1401 et seq., and the regulations thereunder, and California Education Code § 56343;

4. Declare that defendants must follow the procedures required by 34 C.F.R. § 104.35 promulgated pursuant to 29 U.S.C. § 794, whenever a proposal is made to change the educational placement of plaintiff and before the educational placement of plaintiff is changed, and permanently enjoin defendants, their agents and employees, from violating 29 U.S.C. § 794 and 34 C.F.R. § 104.35;

5. Declare that California Education Code §§ 48210-48214 relating to exclusion and any California or SFUSD administrative regulations promulgated pursuant thereto, as applied to plaintiff, a handicapped student, violate 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees, from relying on California Education Code §§ 48210-48214 to exclude handicapped students from the San Francisco Unified School District;

6. Declare that California Education Code § 48900 et seq., relating to expulsion, and any state or SFUSD administrative regulations promulgated pursuant thereto as applied to plaintiff, a

handicapped student, violate 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on California Education Code § 48900 et seq., to expel handicapped students from the SFUSD;

7. Declare that any California statute or regulation or SFUSD regulation that purports to allow suspension, exclusion or expulsion of plaintiff from his educational placement for behavior that is caused by or a manifestation of plaintiff's handicap, including 5 California Administrative Code § 3308, violates 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on any California statute or regulation or SFUSD regulation to suspend, exclude or expel handicapped students for behavior that is caused by or manifestation of the student's handicap;

8. Declare that 5 California Administrative Code § 3308(m) which purports to allow interim exclusion of a handicapped student from his educational placement during fair hearing proceedings, and any other California statute or regulation or SFUSD regulation that purports to authorize such interim exclusion, violates 29 U.S.C § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on any California statute or regulation or SFUSD regulation to exclude handicapped students from their educational placements during fair hearing proceedings;

9. Declare that California Education Code § 48900 et seq., relating to suspension and any California or SFUSD administrative regulations promulgated pursuant thereto, as applied to plaintiff, a handicapped student, for behavior caused by or a manifestation of plaintiff's handicaps violates 29 U.S.C. § 794, 20



U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on any California statute or regulation or SFUSD regulation to suspend handicapped students for behavior that is caused by or a manifestation of their handicaps;

10. Declare that suspension or exclusion of plaintiff from his educational placement for indefinite periods of time or for periods longer than the time allowed in the suspension provisions in California Education Code § 48900 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees, from relying on any California statute or regulation or SFUSD regulation to suspend or exclude handicapped students from their educational placements for indefinite periods or periods longer than the time allowed in the suspension provisions in California Education Code § 48900 et seq.;

11. Declare that referral of plaintiff, a handicapped student, to the SFUSD Student Placement Committee violates 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on any California statute or regulation or SFUSD regulation to refer handicapped students to the SFUSD Student Placement Committee;

12. Order defendant Wilson Riles as California State Superintendent of Public Instruction to establish policies and procedures to insure that the procedures for the change of educational placement of handicapped children comply with the procedural safeguards and requirements of 20 U.S.C. § 1401 et seq., 29 U.S.C. § 794, and the regulations promulgated pursuant to these laws;

13. Order defendants to expunge from plaintiff's SFUSD files any record of, or reference to, plaintiff's referral to the SFUSD Student Placement Committee;

14. Award to plaintiff all appropriate damages, including punitive damages;

15. Award to plaintiff all costs and attorneys' fees;

16. Grant such other and further relief as this Court may deem just and proper.

DATED: December 30, 1980.

Respectfully submitted,

LEGAL SERVICES FOR CHILDREN, INC.

SHEILA BROGNA

/s/ SUSAN SPELLETICH
Susan Spelletich
Attorneys for Plaintiff



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Attorneys for State Defendant Wilson Riles

United States District Court
Northern District of California

No. C 80 4270 MHP

John Doe,
Plaintiff,

v.

William Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, Individually and in Their Capacities as Members of The San Francisco Unified School District Board of Education; Robert Alioto, Individually and in His Capacity as Superintendent of The San Francisco Unified School District; Robert Figone, Individually and in His Capacity as Chairperson of The Student Placement Committee of The San Francisco Unified School District; Henry Caruso, Individually and in His Capacity as Principal of The Louise Lombard School in The San Francisco Unified School District; Wilson Riles, Individually and in His Capacity as The California State Superintendent of Public Instruction, Defendants.

## AMENDED ANSWER TO FIRST AMENDED COMPLAINT CIVIL RIGHTS

[Filed Jan. 19, 1981]

COMES NOW defendant Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruc-

tion, and answers the first amended complaint (Civil Rights) on file as follows:

1. Answering the allegations of paragraphs 3, 4, 5, and 6, denies that jurisdiction is vested in this court over the action as pled in this complaint.

2. Answering the allegations of paragraphs 7, 14, 15, 16, 17, 18, 19, 20, 21, and 22, lacks sufficient information and belief to be able to answer the allegations of these paragraphs and on that basis denies each and every allegation contained therein. Defendant further alleges, in this regard, that an administrative procedure exists for the defendant Riles to make specific findings of fact regarding those factual issues raised by the plaintiff, that that administrative procedure is authorized by 20 U.S.C. section 1415 and the regulations promulgated in conformity with and pursuant to the authority in such Title and pursuant to Chapter 5 of Part 30 (commencing with section 56000) of the Education Code and the regulations promulgated in conformity with and pursuant to the authority in such Code, and that this administrative procedure has not been exhausted by the plaintiff or the local defendants.

3. Answering the legal conclusions set forth from paragraph 23 through paragraph 34, these conclusions as conclusions of law are neither admitted or denied.

4. Answering the allegations of paragraphs 35 through 47, denies each and every allegation contained therein and specifically denies defendant Riles has performed any act for which he is subject to any legal award or equitable relief from this Court,

## AFFIRMATIVE DEFENSES

1. The plaintiff has not exhausted his administrative remedies and thus, regarding the defendant Riles, has stated no grounds for relief from this Court or for jurisdiction to be vested in this Court, in that the plaintiffs have not exhausted the procedures set forth, authorized and required by 20 U.S.C. section 1413 and the regulations promulgated in conformity with and pursuant to the authority of such Title, and by Chapter 5 of Part 30 (commencing with section 56000) of the California Education Code and the



regulations promulgated in conformity with and pursuant to the authority in such Code.

2. Pursuant to the allegations set forth in paragraph 1 of these affirmative defenses, this action as it relates to the defendant Riles is not ripe for adjudication.

3. Pursuant to the allegations set forth in paragraph 1 of these affirmative defenses, this Court should abstain until the administrative procedure available to local defendants and the plaintiff is exhausted.

Pursuant to the allegations set forth in paragraph 1, the defendant Riles is not at a point at which he can make a factual finding or admission or denial regarding the allegations of this complaint and, on this basis, contends that no grounds exist upon which a legal award or equitable relief can be granted by this Court.

DATED: January 16, 1981

GEORGE DEUKMEJIAN
Attorney General
THOMAS WARRINER
Assistant Attorney General

/s/ CHARLTON G. HOLLAND
Charlton G. Holland
Deputy Attorney General
Attorney for State Defendant
Wilson Riles

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Legal Services for Children, Inc.
149 Ninth Street, Top Floor
San Francisco, California 94103
Telephone: (415) 863-3762

Attorneys for Plaintiff-Intervenor

In the United States District Court
for the
Northern District of California
Civil No. C 80 4270 MHP

John Doe,
Plaintiff,

vs.

Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as members of the San Francisco Unified School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, individually and in his capacity as Chairperson of the Student Placement Committee of the San Francisco Unified School District; Henry Caruso, individually and in his capacity as Principal of the Louise Lombard School in the San Francisco Unified School District; Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruction,
Defendants,

Jack Smith, a Minor, by his Guardian ad Litem Queenie Izzo,
Plaintiff-Intervenor.



## ORDER GRANTING MOTION TO INTERVENE AS A PLAINTIFF

[Filed Feb. 27, 1981]

The motion of Jack Smith for an order permitting him to intervene as a plaintiff in the above-entitled action came on for hearing before the Honorable Marilyn Hall Patel on February 23, 1981.

The memoranda and arguments of counsel have been considered by the court.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the motion of Jack Smith to intervene as a plaintiff is granted and that Smith is granted leave to intervene and to file a complaint as a plaintiff-intervenor in the above-entitled action. The motion of Smith to intervene is granted with the understanding that his action may be severed from that of John Doe for trial.

DATED: February 27, 1981.

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Court
Judge

Susan Spelletich
Sheila Brogna
Legal Services for Children, Inc.
149 Ninth Street, Top Floor
San Francisco, California 94103
Telephone: (415) 863-3762

Attorneys for Plaintiff-Intervenor

In the United States District Court
for the
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Civil No. C 80 4270 MHP

John Doe,
Plaintiff,

vs.

Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as members of the San Francisco Unified School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, individually and in his capacity as Chairperson of the Student Placement Committee of the San Francisco Unified School District; Henry Caruso, individually and in his capacity as Principal of the Louise Lombard School in the San Francisco Unified School District; Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruction,
Defendants,

Jack Smith, a Minor, by his Guardian ad Litem [redacted]
Plaintiff-Intervenor.



## ORDER APPOINTING GUARDIAN AD LITEM FOR JACK SMITH

[Filed Feb. 27, 1981]

The verified petition of Smith nominating [redacted] to serve as his guardian ad litem, and the consent of [redacted] to serve as the guardian ad litem in the above-entitled action, has been considered by this court.

Good cause appearing therefor from the petition of Jack Smith,

IT IS HEREBY ORDERED that [redacted] be, and she is hereby appointed guardian ad litem for Smith, a minor, and that such guardian ad litem prosecute the above-entitled action on behalf of the minor, and that such guardian ad litem is authorized to allow Legal Services for Children, Inc., as attorneys for the minor, to conduct such litigation on the minor's behalf at no fee.

DATED: February 27, 1981.

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Court
Judge

SUSAN SPELLETICH
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Legal Services for Children, Inc.
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Telephone: 415/863-3762
Attorneys for Plaintiff-Intervenor

In the United States District Court
for the
Northern District of California

Civil No. C 80 4270 MHP

John Doe,
Plaintiff,

vs.

Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as Members of the San Francisco Unified School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, Individually and in his capacity as Chairperson of the Student Placement Committee of the San Francisco Unified School District; Henry Caruso, individually and in his capacity as Principal of the Louise Lombard School in the San Francisco Unified School District; Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruction, Marybeth Barrett, individually and in her capacity as Principal of the A.P. Giannini School in the San Francisco Unified School District,
Defendants,

Jack Smith,
Plaintiff-Intervenor.

# COMPLAINT OF PLAINTIFF-INTERVENOR CIVIL RIGHTS

[Filed Mar. 25, 1981]



## *INTRODUCTORY STATEMENT*

1. This action arises under the provisions of The Education of the Handicapped Act, as amended, 20 U.S.C. § 1401 et seq., and the regulations promulgated thereunder; under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the regulations promulgated thereunder; under 42 U.S.C. § 1983; and under the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Plaintiff-intervenor seeks declaratory and injunctive relief against defendants for denial of his rights under The Education of the Handicapped Act to receive a free appropriate public education in the least-restrictive educational environment, to have all changes of educational placement effectuated in accordance with the procedures prescribed in the Act, and to remain in his currently assigned placement until resolution of any administrative and judicial proceedings pursuant to the Act. Plaintiff-intervenor seeks relief from actions of the defendants that have excluded him from participating in a program which receives federal financial assistance solely by reason of his handicap, in violation of § 504 of The Rehabilitation Act of 1973. Plaintiff-intervenor also seeks relief from actions of the defendants under color of state law that deprive him of rights, privileges, and immunities guaranteed by the Fourteenth Amendment to the United States Constitution and deprive him of his civil rights guaranteed by The Education of the Handicapped Act and The Rehabilitation Act of 1973 in violation of 42 U.S.C. § 1983.

## *JURISDICTION*

3. Plaintiff-intervenor, as a student identified as handicapped, seeks to enforce the rights conferred on him by The Education of the Handicapped Act. This Act confers jurisdiction on this Court over plaintiff-intervenor's claim of defendants' noncompliance with the procedural requirements of the Act regardless of the amount in controversy, 20 U.S.C. § 1415(e)(4).

4. This action also seeks to redress the deprivation under color of state law of rights, privileges, and immunities guaranteed to plaintiff-intervenor as a handicapped person and student by the

United States Constitution and the anti-discrimination provision of The Rehabilitation Act of 1973, 29 U.S.C. § 794. Therefore, jurisdiction is also conferred on this Court by 28 U.S.C. § 1343(3) and (4).

5. This action arises under the Constitution and laws of the United States, as set forth herein, and the amount in controversy exceeds $10,000, exclusive of interest and costs.

6. Plaintiff-intervenor's action for declaratory and injunctive relief is authorized by 28 U.S.C. § 2201 and § 2202 and by Federal Rules of Civil Procedure 57 and 65 relating to declaratory judgments and injunctions.

*PLAINTIFF-INTERVENOR*

7. Plaintiff-intervenor Jack Smith, a thirteen-year old minor, is a resident of San Francisco, California, and a student in the San Francisco Unified School District (SFUSD). Jack is an educationally handicapped child eligible for special education and related services pursuant to The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and the regulations promulgated thereunder, as implemented by California Education Code § 56000 et seq. Jack is a handicapped individual within the meaning of § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiff-intervenor has been defined as educationally handicapped for several years.

8. In Jack's Individualized Education Program (IEP) dated February 4, 1980, he is defined as educationally handicapped with learning disabilities, pursuant to federal and California law. Jack's assigned educational placement resulting from this IEP is a full-day program at A. P. Giannini School in the San Francisco Unified School District. This is Jack's currently assigned educational placement. In Jack's Individualized Education Program dated January 6, 1981, he is defined as educationally handicapped with a primary handicap of serious emotional disturbance, pursuant to federal and California law. As of the date of this complaint, Jack has no assigned educational placement pursuant to his 1981 IEP. A true copy of Jack's 1980 IEP is attached as Exhibit 1 and



incorporated herein by reference. A true copy of Jack's 1981 IEP is attached as Exhibit 2 and incorporated herein by reference.

*DEFENDANTS*

9. Wilson Riles is the California State Superintendent of Public Instruction, and as such is responsible at the state level for administering the provisions of Part 30 of the California Education Code governing special education, California Education Code § 56120. Defendant Riles is responsible for administering California Education Code provisions that implement plaintiff's right to a free appropriate public education pursuant to 20 U.S.C. § 1401 et seq., and procedural safeguards of 20 U.S.C. § 1401 et seq., and the federal regulations promulgated thereunder.

10. Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom constitute the San Francisco Unified School District Board of Education. The SFUSD Board of Education has ultimate responsibility for establishing policies for the operation of the SFUSD, including policies concerning the provisions of publicly-funded special education programs for students in the SFUSD, and for the exclusion or expulsion of students from the SFUSD.

11. Robert F. Alioto is the Superintendent of the San Francisco Unified School District, chosen and appointed by the SFUSD Board of Education, to carry through procedures created by the Board or mandated by law, including operation of the special education programs in the SFUSD. Defendant Alioto is responsible for insuring that handicapped students in the SFUSD are treated in compliance with 20 U.S.C. § 1401 et seq., as implemented by California Education § 56000 et seq., and in compliance with 29 U.S.C. § 794.

12. Robert Figone is the Chairperson of the Student Placement Committee of the SFUSD. The Student Placement Committee, through its Chairperson, processes disciplinary referrals of students from SFUSD school principals and recommends expulsion or exclusion to the Board of Education. Defendant Figone is responsible for administering the California Education Code dis-

ciplinary provisions and SFUSD disciplinary policies, as Superintendent Alioto's designee.

13. Marybeth Barrett is the principal of A. P. Giannini School in the SFUSD, and as such is responsible for the operation and administration of A. P. Giannini School in compliance with SFUSD Board of Education policies and state and federal law. Defendant Barrett is responsible for supervision of the educational programs of educationally handicapped students at A. P. Giannini School. Defendant Barrett has the same authority and responsibilities at A. P. Giannini School as defendant Caruso has at Louise Lombard School.

14. All defendants, and their legal successors in office, are sued in their individual as well as their official capacities.

## *NARRATIVE OF EVENTS*

15. Jack is an articulate and attractive thirteen-year old of above average intelligence who has a personal history of tragedy and abuse. He was placed by the Department of Social Services with his paternal grandparents at their home in San Francisco.

16. Jack was identified as educationally handicapped by the SFUSD by the time he was in the second grade in 1976. It was noted in the Admission Committee Action Report concerning Jack, dated March 17, 1976, that Jack had behavior disorders in that he had an "inability to control verbal or physical outburst" and "serious emotional disturbance". A true copy of this Admission Committee Action Report is attached as Exhibit 3 and incorporated herein by reference.

17. In a subsequent Admission Committee Action Report dated June 19, 1976, Jack was again identified as educationally handicapped. Once again, the SFUSD recognized Jack as having a behavior disorder identified as "inability to control verbal or physical outburst." This report also notes that Jack had a "serious emotional disturbance," specific learning disabilities, and "severe disturbance in relationships with peers and adults." A true copy of this Admission Committee Action Report is attached as Exhibit 4 and incorporated herein by reference.



18. Jack attended Edgewood Learning Center, a private school for emotionally disturbed children, from December, 1976, until Fall, 1979. An extensive evaluation of Jack prepared by Edgewood personnel prior to his entry into the program describes Jack as follows: "When threatened and under stress, [Jack] attempts to cover his feelings of low self worth through aggressive behavior. These actions are primarily verbal provocations." The evaluator reported: "He [Jack] once threatened me with his fist, but my clear supportive "no" response to his threat quickly diminished that action... [Jack] will continue to have learning problems because of his emotional insecurity, which is handled by him primarily, at present, through verbal provoking" (p. 4). A true copy of the Edgewood Evaluation, dated November 5, 1976, is attached as Exhibit 5 and incorporated herein by reference.

19. In an IEP for Jack by the SFUSD dated April 5, 1978, Jack's handicap was diagnosed as "low academic achievement due to behavioral disorders and extreme hyper-reactivity." His social adaptation skills were found to be "inappropriate for age" with "poor peer relationships." A supportive, structured classroom was recommended for Jack, based upon the finding that he "requires *constant* monitoring and supervision in as close to a stimulus-free environment as possible." A true copy of Jack's IEP dated April 5, 1978, is attached as Exhibit 6 and incorporated herein by reference.

20. Jack's IEP by the SFUSD dated January 12, 1979, describes Jack as hyperactive and distractable, with poor peer relationships. This IEP specified that Jack needed a structured learning environment providing "one-to-one attention" and "constant monitoring." Hyperactivity and poor peer relationships were again noted. A true copy of Jack's IEP dated January 12, 1979, is attached as Exhibit 7 and incorporated herein by reference.

21. In September, 1979, Jack began classes at A. P. Giannini Middle School, a SFUSD public school.

22. On February 4, 1980, an IEP meeting was held at Giannini School for Jack. He was again identified as a learning-disabled student, and the recommended program was a Learning Disability Group in the regular school setting, A. P. Giannini

School, based upon his "weakness in major modalities and emotional difficulties." This IEP noted that he had "high anxiety, low self-esteem," and recommended a "highly-structured environment with well-defined limits and close supervision." See Exhibit 1.

23. In September, 1980, at the beginning of the current school year, Jack was assigned to a full day program at A. P. Giannini with learning disabled group special education classes.

24. On October 14, 1980, for behavioral problems during the school day; Jack's program was reduced to a half-day by the administration of Giannini School despite his grandparents' objections. He was dismissed from school each day at 12:30 p.m., before lunch.

25. On November 4, 1980, a conference was held at A. P. Giannini with Jack's grandparents. Despite the recognition and consensus of school administrative opinion that "[Jack] acts impulsively [and] doesn't plan to do the things he does," school personnel informed Jack and his grandparents that any further disturbances on his part would result in his suspension from school and referral to the Student Placement Committee for placement in another education setting. The school offered that each two weeks of "successful" conduct would lead to the addition of one school period for Jack. The directions of the conference were confirmed in a letter sent by the assistant principal to Jack's grandparents. A true copy of this letter is attached as Exhibit 8 and incorporated herein by reference.

26. On November 14, 1980, Jack was suspended from A. P. Giannini School for five days pursuant to California Education Code § 48900(h), "disrupting school activities." A true copy of the Notice of Suspension is attached as Exhibit 9 and incorporated herein by reference.

27. On November 17, 1980, the principal of A. P. Giannini School, Marybeth Barrett, referred Jack to the Student Placement Committee of the SFUSD. The referral noted that "[Jack's] actions seem beyond his control. He always admits what he does and is sorry afterward. he cannot deal with his peers, although academically is fine." However, the referral was based



on an anecdotal record since the start of the school year. A true copy of the Student Placement Committee Referral is attached as Exhibit 10 and incorporated herein by reference.

28. The behavior that resulted in Jack's school program being reduced from full-day to part-day his suspension, his referral to the Student Placement Committee, and the Student Placement Committee's recommendation of exclusion, is a manifestation of his educational handicaps, as recognized in his Admission Committee Action Reports, evaluations, and Individualized Education Programs over the past several years. His behavior was totally in keeping with, and caused by, his handicaps as described in these documents. The SFUSD and the staff at A. P. Giannini School were on notice of Jack's behavioral and emotional problems through these documents which are included in Jack's school file and available to all SFUSD personnel. Additionally, these behavioral and emotional problems of Jack's are discussed in various psychological evaluations of Jack. A psychological report dated March 19, 1976, notes Jack's above-average intellectual capacity, but impaired functioning due to emotional problems, and aggressive reaction to possible rejection by other people. A true copy of this report is attached as Exhibit 11 and incorporated herein by reference. Jack's emotional and behavioral problems are also discussed in psychological reports dated December 8, 1978, September 21, 1979, and October 12, 1979, attached respectively as Exhibits 12, 13, and 14, and incorporated herein by reference.

29. In a letter dated November 21, 1980, Jack's grandparents were notified that the SFUSD Student Placement Committee had recommended his exclusion from the SFUSD pursuant to disciplinary provisions of the California Education Code and SFUSD Board of Education Policy 5114. Jack and his grandparents were notified that a meeting of the Student Placement Committee would be held on December 2, 1980, to review Jack's exclusion from the SFUSD. In addition, this letter stated that Jack would continue to be on indefinite suspension pending final action in the matter. A true copy of this letter is attached as Exhibit 15 and incorporated herein by reference.

30. Plaintiff-intervenor, through counsel, protested this referral to the Student Placement Committee and his indefinite

suspension in a letter to the SFUSD, informing the Student Placement Committee that such a referral of an educationally handicapped student violates special education administrative procedures concerning changes of placement. The cancellation of the Student Placement Committee hearing and the convening of an IEP meeting was required pursuant to special education law. A true copy of this letter is attached as Exhibit 16 and incorporated herein by reference.

31. On December 1, 1980, Robert Figone, chairperson of the Student Placement Committee, cancelled the Student Placement Committee hearing concerning Jack that was scheduled for December 2, 1980. However, Jack was not allowed to return to a full-day program at A. P. Giannini School.

32. On December 2, 1980, Robert Figone stated that Jack could either return to a part-day program at A. P. Giannini, or could receive home teaching. Since Jack was not allowed to return to a full-day program, Jack and his grandparents decided that home teaching was a more appropriate alternative than a part-day program at that time, and so informed Mr. Figone on December 3, 1980.

33. A home teaching program was not initiated, however, and on December 8, 1980, Jack's counsel repeated the request for home teaching and the initiation of the correct special education procedures, in a letter to Mr. Figone. A true copy of this letter is attached as Exhibit 17 and incorporated herein by reference.

34. An IEP meeting concerning plaintiff-intervenor was held on January 6, 1981. The IEP committee received at that meeting a copy of a letter from Jack's psychotherapist which details his personal history, his "pressing needs in academic and psychological areas," and recommends an integrated program of psychotherapy and special education. A true copy of this letter is attached as Exhibit 18 and incorporated herein by reference.

35. This IEP concerning Jack, dated January 6, 1981, again notes that Jack has difficulties with peers, that his academic skills "fluctuate" and that his behavior is "dependent on internal emotional state." His "primary" handicap is indicated as "serious emotional disturbance," and the recommended placement is for a



full-day special education program "in a small school setting with highly structured environment and co-ordination with therapeutic services." See Exhibit 2.

36. As of the date of this complaint, Jack has not been assigned to the educational placement described in his IEP of January 6, 1981, by the SFUSD.

## *LEGAL FRAMEWORK OF PLAINTIFF'S CLAIM*

### *The Education of the Handicapped Act*

37. The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., as amended, and the regulations promulgated thereunder, 34 C.F.R. Part 121a, detail specific rights to which handicapped children are entitled. Included among these are:

(a) The right to a "free and appropriate public education," 20 U.S.C. § 1401(16) and (18); 34 C.F.R. § 121a.1, § 121a.4, § 121a.14;

(b) The right to remain in the current educational placement during any proceeding related to the placement of the child or the provision of a free appropriate public education, 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 121a.513;

(c) The right to education in the "least restrictive environment," 20 U.S.C. § 1412(5)(B); 20 U.S.C. § 1414(a)(1)(C)(iv); 34 C.F.R. § 121a.132, § 121a.227, § 121a.550-556;

(d) The right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, and 34 C.F.R. § 121a.500-514.

38. States are required by 20 U.S.C. § 1412(4) and 20 U.S.C. § 1414(a)(5) to insure that each local educational agency in the State establishes and maintains an individualized education program for each handicapped student. The local public educational agency is held responsible by 34 C.F.R. § 121a.343 for initiating and conducting meetings for the purpose of developing, reviewing and revising a handicapped child's Individualized Education Program.

39. State and local educational agencies are required by 20 U.S.C. § 1415(a) and 34 C.F.R. § 121a.501 to establish and maintain a system of procedural safeguards with respect to the provision of a free appropriate public education to handicapped students by these agencies. These safeguards include:

(a) Written notice to the parents of a handicapped child a reasonable time before the public agency proposes to change the educational placement of the child or the provision of a free appropriate public education of the child, 20 U.S.C. § 1415(b)(1)(C) and 34 C.F.R. § 121a.504;

(b) This written notice must include a full explanation of all the procedural safeguards available to the parents and a description of the action proposed, an explanation of why the agency proposes to take the action, and a description of any options the agency considered and the reason why those options were rejected, 20 U.S.C. § 1415(b)(1)(D) and 34 C.F.R. § 121a.505;

(c) The parents of the child must be provided with an opportunity for an impartial due process hearing on any proposal to change the educational placement of the child or the provision of a free appropriate public education to the child, 20 U.S.C. § (b)(2) and 34 C.F.R. § 121a.506-512;

(d) During the pendency of any administrative or judicial proceeding concerning the child's placement or program, the child must remain in his then-current educational placement unless the public agency and the parents of the child agree otherwise, 20 U.S.C. § 1415(e)(3) and 34 C.F.R. § 121a.513.

40. The SFUSD, directly and through the California State Department of Education, receives federal financial assistance under the Education for the Handicapped Act, which is utilized by the schools in the SFUSD, including A. P. Giannini School, for services to handicapped children.

*California Education Code Provisions*
*Implementing the Education of the Handicapped Act*

41. The federal Education of the Handicapped Act requires states to meet the above-described requirements in order to



qualify for financial assistance for public education for the handicapped. California law implementing this federal law is found in California Education Code § 56000 et seq. (Statutes 1980, Chapter 797, effective July 28, 1980).

42. California law provides to each handicapped student "an education appropriate to his needs in publicly supported programs. . . ," Education Code § 56001(a).

43. The California Education Code places certain requirements on each local school district concerning handicapped students, in compliance with the federal Education for the Handicapped Act, including:

(a) Each school district must initiate and conduct meetings for the purposes of developing, reviewing and revising the IEP of each individual with exceptional needs, Education Code § 56340;

(b) An IEP team must meet whenever the pupil's placement, instruction, services, or any combination thereof as specified in the IEP is to be developed, changed or terminated, Education Code § 56343(b);

(c) Specific due process hearing procedures apply whenever there is a proposal to change the educational placement of a child, or the provision of free appropriate public education to a child, Education Code § 56501;

(d) These due process procedures include the right to a fair and impartial administrative hearing at the state level before a person knowledgeable in the laws governing special education and administrative hearings, Education Code § 56501(b)(3);

(e) During the pendency of the hearing proceedings the pupil is entitled to remain in his present placement, Education Code § 56505(d). Certain limited exceptions are provided by administrative regulation if the school district follows procedures for removal of a student from his placement in accordance with Title 5, California Administrative Code § 3308. The San Francisco Unified School District did not follow those procedures in plaintiff-intervenor's case.

*Section 504 of The Rehabilitation Act of 1973*

44. Section 504 of The Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, and the regulations promulgated thereunder, 34 C.F.R. Part 104, prohibit the exclusion, solely by reason of his handicap, of any otherwise qualified handicapped individual in the United States, from participating in, from the benefits of, or from being subject to discrimination under any program or activity receiving Federal financial assistance.

45. The SFUSD, as a result of receiving federal financial assistance, is subject to the requirements of 29 U.S.C. § 794.

46. The SFUSD must provide a free appropriate public education to each qualified handicapped person within the SFUSD, regardless of the nature or severity of the person's handicap, 34 C.F.R. § 104.33.

47. The SFUSD must conduct an evaluation of a handicapped student before making any significant change in the student's placement, 34 C.F.R. § 104.35.

48. The SFUSD must follow certain procedural safeguards when taking any action regarding the identification, evaluation, or educational placement of handicapped students, including notice, an opportunity to examine records, an impartial hearing, and a review procedure, 34 C.F.R. § 104.36.

*FIRST CAUSE OF ACTION*

49. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., by denying plaintiff-intervenor his right to a free and appropriate public education in the least restrictive environment by denying him a full-day educational program.

*SECOND CAUSE OF ACTION*

50. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., by denying plaintiff his right to a free and appropriate public education in the least



restrictive environment by excluding him from his educational placement.

*THIRD CAUSE OF ACTION*

51. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., by changing plaintiff-intervenor's educational placement and the provision of a free appropriate public education to him in violation of the procedural requirements in 20 U.S.C. § 1415. Defendants failed to provide plaintiff-intervenor and his grandparents with proper notice of the proposed change of placement and change in the provision of a free appropriate public education, which should have included a description of all procedural safeguards which The Education of the Handicapped Act requires, a description of options the school district considered, and the reasons they were rejected.

*FOURTH CAUSE OF ACTION*

52. Defendants have violated The Education of the Handicapped Act, 20 U.S.C. § 1415(e)(3) and 34 C.F.R. § 121a.513, by denying plaintiff-intervenor his right to remain in his current educational placement during proceedings relating to plaintiff-intervenor's placement and proceedings relating to the provision of a free appropriate public education by excluding plaintiff-intervenor from his full-day educational placement.

*FIFTH CAUSE OF ACTION*

53. Defendants have violated The Eduction of the Handicapped Act, 20 U.S.C. § 1401 et seq., as implemented by California Education Code § 56000 et seq., by failing to convene an IEP team meeting prior to changing plaintiff-intervenor's placement, instruction and services as specified in his IEP, as required by California Education Code § 56343.

*SIXTH CAUSE OF ACTION*

54. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by denying plaintiff-intervenor his right,

regardless of the nature or severity of his handicap, to a free appropriate public education, by denying him a full-day educational program.

### *SEVENTH CAUSE OF ACTION*

55. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by denying plaintiff-intervenor his right, regardless of the nature or severity of his handicap, to a free appropriate public education, by excluding plaintiff from his eductional placement.

### *EIGHTH CAUSE OF ACTION*

56. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by excluding plaintiff-intervenor from his educational placement and the SFUSD solely by reason of his handicap.

### *NINTH CAUSE OF ACTION*

57. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by denying plaintiff-intervevor a full-day educational program solely by reason of his handicap.

### *TENTH CAUSE OF ACTION*

58. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by excluding plaintiff-intervenor from his educational placement and the SFUSD, which is a significant change in placement, without first conducting an evaluation of plaintiff-intervenor as required by 34 C.F.R §104.35.

### *ELEVENTH CAUSE OF ACTION*

59. Defendants have violated § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, by excluding plaintiff-intervenor from a full-day educational program, which is a significant change in placement, without first conducting an evaluation of plaintiff-intervenor as required by 34 C.F.R. § 104.35.



### *TWELFTH CAUSE OF ACTION*

60. Defendants, acting under color of state law, have deprived plaintiff-intervenor of rights, privileges and immunities, and denied him his civil rights, guaranteed him by The Education of the Handicapped Act, in violation of 42 U.S.C. § 1983, in that defendants excluded plaintiff-intervenor from his educational placement in violation of the procedural requirements of The Education of the Handicapped Act and deprived him of his right to a free appropriate public education in the least restrictive environment which is guaranteed to him by The Education of the Handicapped Act, by acting pursuant to exclusion and expulsion provisions of the California Education Code and the regulations promulgated thereunder in Title 5, California Administrative Code.

### *THIRTEENTH CAUSE OF ACTION*

61. Defendants, acting under color of state law, have deprived plaintiff-intervenor of rights, privileges and immunities, and denied him his civil rights, guaranteed him by § 504 of The Rehabilitation Act of 1973 in violation of 42 U.S.C. § 1983, in that defendants excluded plaintiff-intervenor from his educational placement in violation of the requirement of § 504 that an evaluation of plaintiff first be conducted, and deprived him of his right to a free appropriate public education regardless of the nature or severity of his handicap which is guaranteed to him by Section 504, by acting pursuant to exclusion and expulsion provisions of the California Education Code and the regulations promulgated thereunder in Title 5, California Administrative Code.

### *FOURTEENTH CAUSE OF ACTION*

62. Defendants have deprived plaintiff-intervenor of his due process rights guaranteed him by the Fourteenth Amendment to the United States Constitution by excluding him from his educational placement and the SFUSD in violation of the procedural requirements of The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and the regulations thereunder, as imple-

mented by California Education Code § 56000 et seq., and in violation of Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations thereunder.

*FIFTEENTH CAUSE OF ACTION*

63. Defendants have deprived plaintiff-intervenor of his due process rights guaranteed him by the Fourteenth Amendment to the United States Constitution by denying him a full-day educational program and reducing his educational program to part-day, in violation of the procedural requirements of The Education of the Handicapped Act, 20 U.S.C. § 1401 et seq., and the regulations thereunder, as implemented by California Education Code § 56000 et seq., and in violation of § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations thereunder.

*SIXTEENTH CAUSE OF ACTION*

64. Defendants, acting under color of state law and in reliance upon California Education Code §§ 48210-48214, have deprived plaintiff-intervenor of rights, privileges and immunities and denied him his civil rights in violation of 42 U.S.C. § 1983, by applying to plaintiff-intervenor, an educationally handicapped child, the standard of California Education Code § 48212 which purports to allow exclusion from a school district any child whose physical or mental disability is such as to cause his attendance to be inimical to the welfare of other pupils, which directly conflicts with the standards of The Education of the Handicapped Act, 29 U.S.C. § 1401 et seq., identifying educationally handicapped children.

*SEVENTEENTH CAUSE OF ACTION*

65. Defendants, acting under color of state law and in reliance upon California Education Code §§ 48210-48214, have deprived plaintiff-intervenor of rights, privileges and immunities and denied him his civil rights in violation of 42 U.S.C. § 1983, by applying to plaintiff-intervenor, an educationally handicapped child, the standard of California Education Code §48212 which purports to allow exclusion from a school district any child whose



physical or mental disability is such as to cause his attendance to be inimical to the welfare of other pupils, which directly conflicts with 29 U.S.C. § 794 which prohibits the exclusion of a handicapped individual solely on the basis of his handicap.

*EIGHTEENTH CAUSE OF ACTION*

66. Defendants will continue to violate Federal law and the United States Constitution as herein described, unless they are prohibited from so acting by this Court, because due to the nature of plaintiff-intervenor's handicap the behavior by him which is the basis for defendants' actions is likely to reoccur.

*PRAYER FOR RELIEF*

WHEREFORE, plaintiff-intervenor respectfully prays that this Court:

1. Enjoin defendants from conducting a hearing to expel or exclude plaintiff-intervenor from the San Francisco Unified School District;

2. Declare that defendants must follow the procedures required by 20 U.S.C. § 1401 et seq., and the regulations thereunder, as implemented by California Education Code § 56000 et seq., whenever a proposal is made to change the educational placement, instruction or services provided to plaintiff-intervenor and before the educational placement, instruction or services to plaintiff-intervenor are changed, and permanently enjoin defendants, their agents and employees from violating 20 U.S.C. § 1401 et seq., and the regulations thereunder, and California Education Code § 56343;

3. Declare that defendants must follow the procedures required by 34 C.F.R. § 104.35 promulgated pursuant to 29 U.S.C. § 794, whenever a proposal is made to change the educational placement of plaintiff-intervenor and before the educational placement of plaintiff-intervenor is changed, and permanently enjoin defendants, their agents and employees, from violating 29 U.S.C. § 794 and 34 C.F.R. § 104.35;

4. Declare that California Education Code §§ 48210-48214 relating to exclusion and any California or SFUSD administrative regulations promulgated pursuant thereto, as applied to plaintiff-intervenor, a handicapped student, violate 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and regulations promulgated pursuant to these laws, and plaintiff-intervenor's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees, from relying on California Education Code §§ 48210-48214 to exclude handicapped students from the San Francisco Unified Schooi District;

5. Declare that California Education Code § 48900 et seq., relating to expulsion, and any state or SFUSD administrative regulations promulgated pursuant thereto as applied to plaintiff-intervenor, a handicapped student, violate 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on California Education Code § 48900 et seq., to expel handicapped students from the SFUSD;

6. Declare that any California statute or regulation, including 5 California Administrative Code § 3308, or SFUSD regulation that purports to allow suspension, exclusion or expulsion of plaintiff-intervenor from his educational placement, or provision of less than a full-day educational program to plaintiff-intervenor on the basis of behavior that is caused by or a manifestation of plaintiff's handicap, violates 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, the plaintiff-intervenor's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on any California statute or regulation of SFUSD regulation to suspend, exclude, expel or provide less than a full-day educational program to handicapped students for behavior that is caused by or manifestation of the student's handicap;

7. Declare that California Education Code § 48900 et seq., relating to suspension and any California or SFUSD administrative regulations promulgated pursuant thereto, as applied to plaintiff-intervenor, a handicapped student, for behavior caused by or a manifestation of plaintiff-intervenor's handicaps violates 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff-intervenor's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on any California statute or regulation or SFUSD regulation to suspend handicapped students for behavior that is caused by or a manifestation of their handicaps;



8. Declare that suspension or exclusion of plaintiff-intervenor from his educational placement for indefinite periods of time or for periods longer than the time allowed in the suspension provisions in California Education Code § 48900 et seq., and the regulations promulgated pursuant to these laws, violates 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff-intervenor's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees, from relying on any California statute or regulation or SFUSD regulation to suspend or exclude handicapped students from their educational placements for indefinite periods longer than the time allowed in the suspension provisions in California Education Code § 48900 et seq.;

9. Declare that referral of plaintiff-intervenor, a handicapped student, to the SFUSD Student Placement Committee violates 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq., and the regulations promulgated pursuant to these laws, and plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution; and permanently enjoin defendants, their agents and employees from relying on any California statute or regulation or SFUSD regulation to refer handicapped students to the SFUSD Student Placement Committee;

10. Declare that denial of a full-day educational program to plaintiff-intervenor, a handicapped student, violates 29 U.S.C. § 794, and the regulations promulgated thereunder; and perma-

nently enjoin defendants, their agents and employees from providing less than a full-day program to handicapped students;

11. Order defendant Wilson Riles as California State Superintendent of Public Instruction to establish policies and procedures to insure that the procedures for the change of educational placement of handicapped children comply with the procedural safeguards and requirements of 20 U.S.C. § 1401 et seq., 29 U.S.C. § 794, and the regulations promulgated pursuant to these laws;

12. Order defendants to expunge from plaintiff-intervenor's SFUSD files any record of, or reference to, plaintiff-intervenor's referral to the SFUSD Student Placement Committee;

13. Award to plaintift-intervenor all appropriate damages, including punitive damages;

14. Award to plaintiff-intervenor all costs and attorneys' fees; and

15. Grant such other and further relief as this Court may deem just and proper.

DATED: January 19, 1981.

Respectfully submitted,

Legal Services For Children, Inc.

/s/ SUSAN SPELLETICH
Susan Spelletich

Sheila Brogna

Attorneys for Plaintiffs-Intervenor



**Exhibit 1, Page 1**

San Francisco Unified School District
Special Programs and Services
Individualized Education Program (IEP)

| | | | | | |
|---|---|---|---|---|---|
| _____ Original Eligibility Date | | | | Feb. 4, 1980 Date of Meeting | |
| _____ IEP Review Date | | | | | |
| Smith Last Name | Jack First Name | H074030125 Student No. | F(M) Sex | 7-10-67 Birthday | CA |
| [redacted] Parent/Guardian | | [redacted] Address | | [redacted] Phone(s) | |
| 7 Grade | Regular Education Teacher(s) | A. P. Giannini School | | OW Ethnic | |
| English Primary Language of Home | | Yes (No) Interpreter Required | | Giannini-Unit III Location of Student Records | |
| Immediate Implementation Date | | One year Projected Duration | | Program Manager Personnel Responsible for Overall Implementation of IEP Annual Review | |

Primary Handicap

Learning disabilities

Recommended Program Placement/Rationale for Placement (least restrictive concept)
E.H./L.D.C.-regular school setting (A.P. Giannini only) with 3 periods of L.D.S. lunch and science (regular program) on a trial basis. Meet for daily instruction in Reading, Spelling, and Math. Weakness in major modalities and emotional difficulties. Additional regular education classes are dependent on Jack's continued improvement.

Extent of Regular Class Placement.

As mutually agreed. Please see addendum.

Services to Regular Education Teacher(s).

Consultation by Special Education Teacher.

Regular P.E. Program when mutually agreed. (See addendum)

Prevocational/Vocational Program: Career Exploration.

| Committee Members | | Approved Yes | IEP No* | | | Approve Yes | IEP No* |
|---|---|---|---|---|---|---|---|
| James T. Hannon Administrator | 2-4-80 Date | | | Mary Tilman Nurse/Medical Representative | 2-4-80 Date | | |
| [redacted] Parent/Legal Guardian | 2-5-80 Date | | | Speech Language Specialist | Date | | |
| Regular Education Teacher | Date | | | Student | Date | | |
| Special Education Teacher | 2-4-80 Date | | | Spec. Ed. Teacher | 2-4-80 Date | | |
| Minerva M. Friedman Psychologist | 2-4-80 Date | | | Sue Supran Also in Attendance | 2-4-80 Date | | |
| Student Services Worker | 2-4-80 Date | | | | | | |

*Attach dissenting statement

To be completed by the Program Manager, Special Education Instructional Services.

| School Site | Program | Placement Date | Placement Permission Sent | Receiving School | Sending Notified |
|---|---|---|---|---|---|

FORM X

**Exhibit 1, Page 2**

San Francisco Unified School District
Special Programs and Services
Individualized Education Program

| 7-10-67 | Smith, | Jack |
|---|---|---|
| Birthdate | Last Name, | First Name |

(Use addendum if more space if necessary)

*CURRENT LEVELS OF EDUCATIONAL PERFORMANCE*

Academic/Cognitive

WRAT—10-79 CTBS 4/78
Reading 4.4 Rdg. 5.0
Math 4.4 Math 7.0
Spelling 3.7 (down from 3.9 in 12/78)
CTBS 11-79
Rdg. 4.7 Math 6.3 Total 6.3

Communication: Speech/Language/Auditory

Appropriate for age level

Psychomotor Skills: Gross, Fine, Visual

Visual-motor directionality difficulties

Gross and fine motor coordination are appropriate for age.

Self-Help Skills/Prevocational-Vocational

Exhibits responsibility for assigned tasks

Activities for daily living, functional and independent skills are appropriate for age.

Behavior/Social Adaptation (Strengths Weaknesses)

On going therapy

Wants to succeed, will take responsibility for completing tasks (homework) can be very courteous warm friendly seeks attention from adults & peers much of the time; highly distractible impulsively takes things—high anxiety, low self-esteem

Student Interests, talents, effective reinforcers



Responds well to praise, verbal & written

Enjoys drawing, music, movies, story telling

Learning/Teaching Styles; Learning Environment; Special Media and Materials

—highly structured environment.
—well-defined limits
—close supervision in small pupil-teacher ratio setting
—screens or low stimuli environment to limit distractibility

Medical Information (use addendum if necessary)

Under medication for hyperactivity (Pemoline E) and therapy

A range of placements has been discussed Yes ☒

Exhibit 1, Page 3

Individualized Education Program
Goals and Objectives
Date: 12/11/79

School: A.P. Giannini

Student's Name: Jack Smith

Birthdate: 7/10/67

Annual Goal: To improve math skills.

Short Term Objective.

Time: By Dec. 1980.

Evaluation Conditions: Given a sp. ed. class.

Observed Behavior: Will improve 1 year in math.

Criteria: Teacher administered test. W.R.A.T.

Person Responsible: Special ed teacher.

Annual Goal: To improve reading skills.

Short Term Objective.

Time: By Dec. 1980.

Evaluation Conditions: Given a special ed. class.

Observed Behavior: Will improve 1 year in reading as measured by the W.R.A.T. test.

Criteria:

Person Responsible: Special ed. teacher.

Annual Goal: By Dec. 1980.

Short Term Objective.

Time:

Evaluation Conditions: Given a regular class one period daily.

Observed Behavior: Will sit and work quietly in a regular classroom setting.

Criteria: For ½ hour or more at a time.

Person Responsible: Sp. Ed. Teacher, Reg. Ed. Teacher, Student.



**Exhibit 1, Page 4**

San Francisco Unified School District
Special Programs and Services
Name: Jack Smith
Birthdate: 7-10-67
Date of Meeting: 2-4-80

*Individualized Education*
*Program Addendum* (Optional Form)

This page is available to supplement information for any section of the I.E.P.

P.E. Program

P.E. in a regular class will begin when mutually agreed by psychologist, sp. ed. teachers, pediatrician and parent.

Jack's plan has been specifically designed for A.P. Giannini due to guardian's (Re. Mrs [redacted] ) insistence, and student's situation. As of 2-80 Smith has been able to handle ½ day program w/ help of medication and therapy. This program is on a trial basis dependant upon Smith's ability to adapt to a regular school.

**Exhibit 2, Page 1**

San Francisco Unified School District
Special Programs and Services
Individualized Education Program (IEP)

Jan. 6, 1981
Date of Meeting

| Smith | Jack | H074030125 | F(M) | 7-10-67 | |
|---|---|---|---|---|---|
| Last Name | First Name | Student No. | Sex | Birthday | CA |

[redacted] | [redacted] | [redacted]
Parent/Guardian | Address | Phone(s)

| A | | A. P. Giannini | OW |
|---|---|---|---|
| Grade | Regular Education Teacher(s) | School | Ethnic |

| English (also Spanish) | Yes (No) | On School Site |
|---|---|---|
| Primary Language of Home/ student | Interpreter Required | Location of Student Records |

| As soon as possible | One year | Program Manager, Final Education |
|---|---|---|
| Implementation Date | Projected Duration | Personnel Responsible for Overall Implementation of IEP teacher, parents and other as ???? |

Primary Handicap: serious emotional disturbance

Recommended program placement: Special education program for full day in small school setting with highly structured environment and coordination with therapeutic services.

Extent of Regular Class Placement.

N/A

Services to Regular Education Teacher(s). N/A

Regular P.E. Program

Career Exploration.

Prevocational/Vocational Program.

| Committee Members | | Approved Yes | IEP No* | | | Approve Yes | IEP No* |
|---|---|---|---|---|---|---|---|
| William T. Henneberry<br>Administrator | 1-6-81<br>Date | | | Nurse/Medical Representative | 2-4-80<br>Date | | |
| [redacted] | 1-6-81 | | | | | | |
| Parent/Legal Guardian | Date | | | Speech Language Specialist | Date | | |
| Regular Education Teacher | Date | | | Student | Date | | |
| Virginia Aalburg<br>Special Education Teacher | 1-6-81<br>Date | | | [redacted]<br>Also in Attendance | 2-4-80<br>Date | | |
| Minerva M. Friedman<br>Psychologist | 1-6-81<br>Date | | | Richard Capurro<br>Also in Attendance | 2-4-80<br>Date | | |
| | 1-6-81 | | | Susan Spelletich | 1-6-81 | | |
| Student Services Worker | Date | | | Also in Attendance | Date | | |

*Attach dissenting statement

To be completed by the Program Manager, Special Education Instructional Services.

| School Site | Program | Placement Date | Placement Permission Sent | Receiving School | Sending Notified |
|---|---|---|---|---|---|
| | | | | | |

FORM X



**Exhibit 2, Page 2**

San Francisco Unified School District
Special Programs and Services
Individualized Education Program

| 7-10-67 | Smith, | Jack |
|---|---|---|
| Birthdate | Last Name, | First Name |

(Use addendum if more space is necessary)

*CURRENT LEVELS OF EDUCATIONAL PERFORMANCE*

Academic/Cognitive

Of at least average intelligence ability

WRAT—11-80
Reading 6,2
Grade 4.6 (Spelling) Arithmetic 5.7

Communication: Speech/Language/Auditory

Appropriate to age

Psychomotor Skills: Gross, Fine, Visual

Appropriate—depending on inner emotional state— Self-Help Skills/Prevocational-Vocational

Activities for daily living, functional skills, independent to age. Maintains paper route and helps in bridge club. Does chores around the home. Participates in church activities.

Behavior/Social Adaptation (Strengths Weaknesses)

Academic skills fluctuate dependent on internal emotional state.

Difficulty relating to peers. Attention span is short in a large classroom.

Student Interests, talents, effective reinforcers

Likes to go swiming, baseball, basketball. Responds well to praise. Recognizing his strengths are good effective reinforcers.

Learning/Teaching Styles; Learning Environment; Special Media and Materials

Can benefit from physical activities when becoming agitated. Needs a structured environment. Needs very clear limits in order to complete tasks. Firm boundaries are needed in order to help him to concentrate. Consistency and continuity are the most helpful when teaching Jack. Small pupil teacher ratio.

Medical Information (use addendum if necessary)

A range of placements has been discussed Yes ☒

Services: Transportation, if necessary

Initiation Date: As soon as possible.

Duration: One year

Person(s) Responsible: Program Manager Special Education Instructional Program.



**Exhibit 2, Page 3**

Individualized Education Program
Goals and Objectives
Date: Jan 6, 1981

School: A.P. Giannini

Student's Name: Jack Smith

Birthdate: 7/10/67

Short Term Objective.

Annual Goal: Improve Spelling skills.

Time: one year.

Evaluation Conditions: Will spell 25 words from 5.5 grade level Dolch list with 90% accuracy.

Annual Goal: Improve reading skills.

Short Term Objective.

Time: One year.

Evaluation Conditions: Will read from 7.5 basal reader w/90% accuracy.

Annual Goal: Improve mathematic skills.

Short Term Objective.

Time: One year.

Evaluation Conditions: Will understand concept and compute +, −, ÷, × fractions, decimals and measurement facts. Teacher made test 90% accuracy.

**Exhibit 2, Page 4**

Individualized Education Program
Goals and Objectives
Date: Jan 6, 1981

School: A.P. Giannini

Student's Name: Jack Smith

Birthdate: 7/10/67

Short Term Objective.

Annual Goal: To improve school behavior.

Time: One year.

Evaluation Conditions: Will be able to compete with peers appropriately in group physical activities such as basketball, baseball, football, volleyball and an opportunity to engage in swimming if possible.

Annual Goal: To improve per. relations.

Short Term Objective.

Time: One year.

Evaluation Conditions: Will relate to peers positively in a small group of 3 to 5 persons.

Criteria: Teacher made social adaptation chart.

Annual Goal: To improve language arts.

Short Term Objective.

Time: One year.

Evaluation Conditions: Will be able to write a paragraph of a minimum of 6 sentences, punctuation, grammar, vocabulary with 90% accuracy.

Person Responsible: Teacher evaluated.



**Exhibit 2, Page 5**

San Francisco Unified School District
Special Programs and Services

Name: Jack Smith
Birthdate: 7-10-67
Date of Meeting: June 6, 1981

Individualized Education Program Addendum (Optional Form)

This page is available to supplement information for any section of the I.E.P.

Behavior/Social (cont.)

Completes assignments only when an adult is with him. Unable to control his impulses. Tends to skips to different tasks. Motivated to learn when his emotional state is appropriate to setting. Warm. Friendly. Strengths need to be reinforced. Demands adults attention. Works well in small group and in a 1-1 situation. Home difficulties are noted. Banging of head at night; wets the bed if not awakened in time. Further information on Jack's emotional disturbance is included in J. Rowe, M.D., report dated 11/3/80.

**Exhibit 3, Page 1**

Special Educational Services Division

3/17/76 — Date of Action
6 — School Zone

## ADMISSION COMMITTEE ACTION REPORT
## PROGRAMS FOR THE EDUCATIONALLY HANDICAPPED
(To be kept in Student's Cumulative Folder)

6126 — EH Screening No.
P A Hearst — School

| Smith, | Jack | 7-10-67 | M | OW | 2 |
|---|---|---|---|---|---|
| (Print) Last Name | First Name | Birthdate | Sex | Ethnic Code | Grade |

| HO 74030125 | [redacted] | M/M [redacted] | [redacted] |
|---|---|---|---|
| Student No. | Address Zip | Parent (or Guardian) Grandparents | Phone |

COMMITTEE FINDINGS OF SPECIFIC HANDICAPS (based on psycho-educational and health studies CAC: Sect. 3231 the committee shall determine the specific eligibility as specified CAC 3230).

✓ Check if there is evidence of a significant discrepancy between ability and achievement (which *must* be present for pupils qualifying under criteria 1 and 2 below).

To be considered for EH programs, the pupil shall qualify under one or more of the following three criteria of educational handicaps, as having a marked learning or behavior disorder not attributable to mental retardation. Check applicable characteristics to support criteria selected. See back of this page for definitions of terms used.

✓ 1. *Specific Learning Disability* (see back for definitions)
✓ Serious reading disability
___ Serious arithmetic disability
___ Serious handwriting disability
___ Language disorder (except aphasia)
✓ Perceptual difficulties
___ Motor incoordination
___ Other (specify)_____
___ Left-right directional confusion
✓ Memory and/or sequencing problems
___ Distractibility or hyperactivity
___ Significant scatter on WISC-R
___ Neurological indicators in testing



___ Verbal or performance deficit (if not due to bilingual or hearing/visual acuity problems)

✓ 2. *Specific Behavior Disorder* (not solely problem behavior)
___ School phobia
___ Withdrawal from class activity
___ Inability to work with class group
___ Perseveration
✓ Inability to control verbal or physical outburst
✓ Emotional indicators in testing
___ Excessive fears
___ Other (specify)_____

✓ 3. *Serious Emotional Disturbance* (psychiatric diagnosis needed)

Pupil exhibits to a marked degree one or more of the following:
✓ Severe disturbance in learning that cannot be explained by intellectual, sensory or health factors
✓ Severe disturbance in relationships with peers and adults
___ Inappropriate behavior or affect under normal circumstances
___ A pervasive and prolonged state of depression or anxiety
___ A constant display of psychosomatic symptoms

___ 4. *Autistic*

Pupil will exhibit a combination of the following characteristics:
___ Unable to use oral language for appropriate communication
___ A history of not relating to people appropriately and continued impairment in social interaction
___ An obsession to maintain sameness
___ Preoccupation with objects and/or inappropriate use of objects
___ Extreme resistance to controls
___ Disturbance in the development of motility evidenced by peculiar motoric mannerisms and motility patterns

CERTIFICATION:

___ 1. Parent permission for testing is attached
✓ 2. Parents were notified 48 hours before Admission Committee Action
___ 3. The pupil's psycho-educational report is attached
___ 4. The pupil's health report is attached
___ 5. The Committee has reviewed and approved the attached educational plan
___ 6. The Committee agrees that the case study and information are adequate for making appropriate educational recommendations
___ 7. The following person shall be responsible for explaining the program to the parent and obtaining signed permission for EH placement

_____
Name (Discipline)



**Exhibit 3, Page 2**

Programs for the Educationally Handicapped

Screening No. 6 Date 3/17/76
E.H. Initial Certification____ E.H. Annual Review
Smith, Jack, 7/10/67 2 P.A. Hearst
(Print) Last Name, First Name, Birthday, Grade, School

Follow-up services: (check recommended services):
Follow-up by: (give name and title)

____ Medical ____ psychiatric or ____neurological exam
____ Counseling _X_ psychotherapy _X_ family _X_ indiv.
Dr. Flohr, patient follow up
____ Tutoring
____ Speech ____ language ____ audiological exam
____ Ophthalmological ____ optometrix exam
____ Vision ____ hearing screening
____ Nutrition ____ sleep ____ personal hygiene
____ Orthodontia ____ dental exam
____ Agency referral (Specify) _____
____ Big Brother/Sister _____
____ Clubs ____ crafts (specify) _____
____ Other (specify) _____

Comments: Transferred from Livermore Valley. Continue LDG for learning and emotional support. He is very eager to learn.
Committee Recommendations:
_X_ Eligible for placement in a program for Educationally Handicapped Pupils
Placement recommendations (list choices in order of preference):
Learning Disability Group:
_X_ Daily maximum
Specify number & content of periods
Reading Clinic Center (twice a week)
Special Day Class
____ Home or Hospital ____ Autistic Program
____ Eligible but not recommended for placement at this time (explain under Comments and re-evaluate in one year)

___ Ineligible for a program for the Educationally Handicapped (explain under Comments)
___ Recommendation withheld for further evaluation (specify under Follow-Up Services)
___ Referral to another program or agency (specify under Follow-Up Services)
___ Referral to generic screening
___ Retention in same grade
___ Modified regular school program

Comments:

Admission Committee Members (CEC: Sect. 6755(a), CAC 3234)
Nancy C. White
Designated Special Education Administrator
Cecile Leonhaeuser
Special Education Teacher
Lorna Phenix
Nurse
Irene Rosenthal, NN41948
Examining School Psychologist, Cert. No.

Member dissenting: _____
Signature

Note: Attach report with reasons for dissent and alternative recommendations (CEC, Sect. 6755(a))

Others Present (in a non-voting capacity):
Edith Paschal, Counselor
Pupil Services worker, (Discipline)
Signature, (Discipline)
Gerson A. Rosenberg, Principal
[redacted]
Signature, (Discipline)
[redacted]
Signature, (Parent)



**Exhibit 4, Page 1**

Special Educational Services Division

6/9/76 — Date of Action
6 — School Zone

ADMISSION COMMITTEE ACTION REPORT
PROGRAMS FOR THE EDUCATIONALLY HANDICAPPED
(To be kept in Student's Cumulative Folder)

6126 — EH Screening No.
P A Hearst — School

| Smith, Jack | 7-10-67 | M | OW | 2 |
|---|---|---|---|---|
| (Print) Last Name First Name | Birthdate | Sex | Ethnic Code | Grade |

HO74030125 — Student No.
[redacted] — Address Zip
M/M [redacted] — Parent (or Guardian) (Grandparents)
[redacted] — Phone

COMMITTEE FINDINGS OF SPECIFIC HANDICAPS (based on psycho-educational and health studies CAC Sect. 3231 the committee shall determine the specific eligibility as specified CAC 3230).

✓ Check if there is evidence of a significant discrepancy between ability and achievement (which *must* be present for pupils qualifying under criteria 1 and 2 below).

To be considered for EH programs, the pupil shall qualify under one or more of the following three criteria of educational handicaps, as having a marked learning or behavior disorder not attributable to mental retardation. Check applicable characteristics to support criteria selected. See back of this page for definitions of terms used.

✓ 1. *Specific Learning Disability* (see back for definitions).
✓ Serious reading disability
___ Serious arithmetic disability
___ Serious handwriting disability
___ Language disorder (except aphasia)
✓ Perceptual difficulties
___ Motor incoordination
___ Other (specify) _____
___ Left-right directional confusion
✓ Memory and/or sequencing problems
___ Distractability or hyperactivity
___ Significant scatter on WISC-R
___ Neurological indicators in testing

___ Verbal or performance deficit (if not due to bilingual or hearing/visual acuity problems)

✓ 2. *Specific Behavior Disorder* (not solely problem behavior)
___ School phobia
___ Withdrawal from class activity
___ Inability to work with class group
___ Perseveration
✓ Inability to control verbal or physical outburst
✓ Emotional indicators in testing
___ Excessive fears
___ Other (specify)_____

✓ 3. *Serious Emotional Disturbance* (psychiatric diagnosis needed)

Pupil exhibits to a marked degree one or more of the following:
✓ Severe disturbance in learning that cannot be explained by intellectual, sensory or health factors
✓ Severe disturbance in relationships with peers and adults
___ Inappropriate behavior or affect under normal circumstances
___ A pervasive and prolonged state of depression or anxiety
___ A constant display of psychosomatic symptoms

___ 4. *Autistic*

Pupil will exhibit a combination of the following characteristics:
___ Unable to use oral language for appropriate communication
___ A history of not relating to people appropriately and continued impairment in social interaction
___ An obsession to maintain sameness
___ Preoccupation with objects and/or inappropriate use of objects
___ Extreme resistance to controls
___ Disturbance in the development of motility evidenced by peculiar motoric mannerisms and motility patterns



CERTIFICATION:

___ 1. Parent permission for testing is attached
✓ 2. Parents were notified 48 hours before Admission Committee Action
___ 3. The pupil's psycho-educational report is attached
___ 4. The pupil's health report is attached
___ 5. The Committee has reviewed and approved the attached educational plan
___ 6. The Committee agrees that the case study and information are adequate for making appropriate educational recommendations
___ 7. The following person shall be responsible for explaining the program to the parent and obtaining signed permission for EH placement

**Exhibit 4, Page 2**

Date 6/9/76

Smith, Jack, 7/10/67 2 P.A. Heart
(Print) Last Name, First Name, Birthdate, Grade, School

Follow-up services: (check recommended services):

___ Medical ___ psychiatric or ___neurological exam
___ Counseling ___ psychotherapy (___ family ___ indiv.)
___ Tutoring
___ Speech ___ language ___ audiological exam
___ Ophthalmological ___ optometric exam
___ Vision ___ hearing screening
___ Nutrition ___ sleep ___ personal hygiene
___ Orthodontia ___ dental exam
___ Agency referral (Specify) _____
___ Big Brother/Sister _____
___ Clubs ___ crafts (specify) _____
___ Other (specify) _____

Comments: Special Day Class placement needed on basis of serious emotional disturbance. Negative behavior triggered by continuous regression.

Committee Recommendations: Initial Certification ___ Annual Review _X_

___ Eligible for placement in a program for Educationally Handicapped Pupils
Placement recommendations (list choices in order of preference):
Learning Disability Group:
___ Daily _____
Specify number & content of periods
___ Reading Clinic Center (twice a week)
_X_ Special Day Class
___ Home or Hospital ___ Autistic Program
___ Eligible but not recommended for placement at this time (explain under Comments and re-evaluate in one year)

___ Ineligible for a program for the Educationally Handicapped (explain under Comments)



___ Recommendation withheld for further evaluation (specify under Follow-Up Services)
___ Referral to another program or agency (specify under Follow-Up Services)
___ Referral to generic screening
___ Retention in same grade
___ Modified regular school program (explain under Comments)
___ Other (specify)

Admission Committee Members (CEC: Sect. 6755(a), CAC 3234)
Nancy C. White
Designated Special Education Administrator
Cecile Leonhaeuser
Special Education Teacher
Lorna Phenix
Public Health Nurse
Edith Paschal No. 654311
Examining School Psychologist, Cert. No.

Member dissenting: _____
Signature

Note: Attach report with reasons for dissent and alternative recommendations (CEC, Sect. 6755(a))

Others Present (in a non-voting capacity):
Prime Worker, (Discipline) _____
Signature, (Discipline) _____
Signature, (Discipline) _____
Signature, (Discipline) _____

**Exhibit 5**

EDGEWOOD

EDUCATIONAL EVALUATION

November 5, 1976

JACK SMITH
B.D.: 7.10.67
C.A.: 9.4
GRADE: 3.2

*TESTS ADMINISTERED:* Peabody Picture Vocabulary Test, Form A (PPVT), Wide Range Achievement Test (WRAT), Diagnostic Reading Scales (DRS) and Beery Developmental Test of Visual-Motor Integration (VMI).

*DATES OF TESTING:* November 2 & 3, 1976.

*Handeness:* Right *Evedness:* Left

Jack was seen for two evaluating sessions totaling one hour and forty five minutes.

After formal introductions to Jack and his grandmother he joined me readily, but he soon scurried off ahead, up the stairs, paying little attention to my request to wait for me. After entry into the testing room and sitting down, he immediately began twisting, squirming and tilting his chair on to his rear legs, he then suddently got up and began examining the room.

He responded to my request to return to his chair. He sat for a few seconds and then dashed to the window to peer out. After asking some questions as to the purpose of the interview, and about school rules, all of which were done/socially acceptable ways he again returned to high activity level of examining the contents of the office.

He again responded to my request to sit down and the testing session began. All went smoothly (for a few minutes) until a large truck drove up the street and Jack dashed to the window to determine the source of the noise. This kind of activity continued to interrupt the evaluating session throughout the first interview.



The second major problem presented during the first session were Jack's reactions to stressful situations created by reaching his performance ceiling. At these times he became negative, verbally provocative, threatened physical abuse, and refused to continue effort on the test items. This dynamic occurred so dramatically and once Jack went in the negative direction not much the examiner offered in support and reassurances could stem that tide.

Once the examiner offerred that maybe Jack's behavior was related to how he might be feeling, or how he might feel when he makes mistakes, he was able to minimally redirect himself and behave in more socially appropriate ways. During the final minutes of the first session Jack requested to draw a picture. In our efforts to locate a ruler in the desk Jack discovered a piece of candy and asked if he may have it. The examiner could not resist the temptation to offer the candy but with obvious contingencies, on his behavior. The contingencies were to be in effect for the remaining, 10 or 15 minutes of the session. The remainder of the session was interrupted by only one, verbal provocative expression, which Jack quickly stopped when I alluded to the reward. When the session ended Jack got the piece of candy and then almost immediately began pushing limits with his verbal high activity level and non responsive behavior.

Jack's behavior during the second session was much different. He only once became verbally provocative; and continually asked, "Am I doing good?"

Reassured that he was doing a fine job he continued his relatively high motivation to complete the educational assessment. When the interview was terminated Jack asked if I had another piece of candy. He got one.

This evaluation produced the following data:

*PPVT:*

| | |
|---|---|
| CA | 9.4 |
| Receptive Vocabulary Quotient | 103 |
| M.A. | 9.5 |

*DISCUSSION:*

There were no significant errors on this test measuring the extent of Jack's listening vocabulary. On items beyond Jack's listening, vocabulary. On items beyond Jack's realm of experience he attempted to use a process of elimination, which occasionally was successful in not making the pictorial representation of the word. The results of this evaluation place him well within the average range potential for learning academics. The results correlate highly with the WISC results of 2/76.

*READING:*

*WRAT:*

Reading Recognition Grade Equivalent 2.1 Stand Sc. 81 %ile

10 DBS:

Word Recognition 2.8

Instructional Level 2.3

Supplemental Phonics Test

Test I—Consonant Sounds 19/21 Correct.

He could not give acceptable sounds for the letters X and Y.

Test II—Vowel Sounds 10/10 Correct. Indicates skills in sounding both long and short vowel sounds. Demonstrated weakness in blending.

Test III—Consonant Blends 12/15 Correct. Productions were minimally acceptable. Tended to insert phonegram or for blends with the second letter being an r. Failed to sound cl, ck, fl.

Test IV—Common syllables 17/33 Correct. Results indicate a general weakness in identifying common word parts in isolation.

Test V—Blending 2/10 Correct. Difficulties arose due to Jack's inability to identify phonegrams (see above Test IV) and his relative weakness to visually synthesize. Auditory closure is a relative strength as demonstrated by his ability to blend test items when the examiner gave them to him orally.



*DISCUSSION:*

The bulk of the DRS was administered during the second interview when Jack's motivational attitude was high. The results of this administration probably reflect Jack's current optimal performance level.

His oral reading is characterized by basically word-by-word reading. He occasionally reads short phrases in the continuously printed material. Jack is currently not comfortable with the reading process. He makes many repetitions, loses his place easily and uses his finger as an reading aid. He makes excessive errors in substitutions and repetition. Many words were aided by the examiner and he made many self-corrections.

Word recognition errors cluster around failure to sound vowel digraphs recognition of phonograms within words and his failure to do complete analysis.

Comprehension of orally read material at the 1.8 and 2.3 grade levels was strong in recalling details and adequate in realizing main idea and implications.

SPELLING:

WRAT—Spelling grade Equivalent 2.3 Stand Sc. 83 %ile 13

Spelling is limited to a minimal sight spelling Vocabulary. Legitimate spelling errors could not be analysed because Jack was unable to tolerate the stress created by this test. When confronted by unknown words he simply, and negatively, wrote down indiscriminate letters. It is evident that Jack has difficulty auditorially analysing and tranducing any analysis to

ARITHMETIC:

WRAT Grade Equivalent 3.0 Stand Sc. 90 %ile 25

A negative approach may have prevented Jack from performing at a higher level. Results of this test indicate adequate basic addition and subtraction fact recall. He has some inkling of basic multiplication and regrouping in addition.

VMI: Age Equivalent 7.10.

Jack is left eyed and right handed. He has good pencil grasp. His VMI age would have been higher if he had not made careless executions and impulsive attacks. There are probably no significant visual-graphic integration difficulties. The alphabet was written in acceptable lower case manuscript. He tended to be impulsive as he progressed. He reversed the letter b. Although this is a slight indication of possible directional confusions, it appeared to occur when he was not attending. When attending he did not give indications of this problem.

A picture Jack drew for me indicates good organizational skills and very adequate drawing ability.

## SUMMARY & RECOMMENDATIONS:

Jack is a good looking, verbally adroit, socially aware, nine year old boy. He knows and can generate socially appropriate behaviors. He can relate to an explanation of procedures and strategy. During the testing he was obviously aware of the examiner making notations. He reacted to it as if he was always making errors. When it was explained to him the reason for such notations his anxiety about the activity decreased.

When threatened and under stress, Jack attempts to cover his feelings of low self worth through aggressive behavior. These actions are primarily verbal provocations. He once threatened me with his fist, but my clear supportive "no" response to his threat quickly diminished that action.

It is clear to this examiner that Jack's [learning] learning difficulties are directly related to his inner turmoil and low level of self worth. These are visual indications of a specific learning disability. Behavior that could be described as hyperactivity is related to two separate phenomenons: 1) Jack is anxious, but he does not appear to be driven physically by this anxiety-more antsyness 2) his behavior has a very clear testing quality. Jack will continue to have learning problems because of his emotional insecurity, which is handled by him primarily, at present through verbal provoking.

Based upon this evaluation I recommend acceptance into Edgewood's program.



## EDGEWOOD

| Problem No. | Date of Onset | PROBLEM | Recommendations Treatment Plan |
|---|---|---|---|
| | | **Behavior** | |
| 1.0 | | Insecurity | 1.0, 1.1, 4.0<br>Specifically developed step-by-st. success oriented instructional program that also provides reachable challenges. |
| | | 1.1 Low self esteem<br>1.2 high anxiety | |
| 2.0 | | Verbally provocative | |
| 3.0 | | Limit testing | |
| 4.0 | | Negativistic | 1.2, 2.0, 3.0, 4.0<br>Limit setting, structured, environment with consequences for appropriate and inappropriate behavior. May be able to intellectualize rationale for specifics of behavior management program. |
| | | **Academic** | |
| 1.0 | | Reading<br>1.1 Limited sight vocabulary<br>1.2 consonent blends<br>1.3 common phonograms<br>1.4 vowel digraphs<br>1.5 visual synthesis<br>a. blending | 1.0, 1.1<br>Use high interest, controlled vocabulary, instructional material at 1.5 to 1.8 level<br>a. Reading for concepts to practice readers<br>Dolch words<br><br>1.2, 1.3, 1.4<br>Phonics instruction.<br>Specific Skills Series<br><br>Supportive reading skills—syllabication<br>Score reading program<br><br>1.5<br>Score reading program<br>Correlate score with spelling instructions |
| 2.0 | | Spelling<br>2.1 Introducing analysis to encoding | 2.0 Second grade level instruction.<br>Correlate reading and spelling instruction. |
| 3.0 | | Arithmetic<br>3.1 Regrouping for addition<br>3.2 Regrouping for subtraction<br>3.3 Multiplication facts | 3.0 Grade level instruction<br><br>3.1, 3.2<br>Isolate for review of learning<br>Place value and regrouping processes.<br>3.3 Assess knowledge to develop learning program |

## EDGEWOOD

| Problem No. | Date of Onset | PROBLEM | Recommendations Treatment Plan |
|---|---|---|---|
| 4.0 | | Graphic Responses<br>4.1 Impulsive<br>4.2 Careless approach<br>4.3 Cursive | 4.0, 4.1, 4.2 Develop reflective approach to task completion. This is a general strong area to capitalize on. May respond to explanation of rationale for such approach<br>4.3 Teach cursive writing<br>4.1 is tied into core problem which relates to Behavior Components. Residential treatment program, to individual therapy to get to content |

Name: Smith, Jack
File No.: 6425
Date: Typed Jan. 21, 1977
Signature: Paul E. Jobin
Dir. Educational Services



**Exhibit 6, page 1**

San Francisco Unified School District
Special Education

Program for the Educationally Handicapped
135 Van Ness Ave.

Pupil Jack Smith Grand: [redacted]
D.O.B. 7/10/67 School Edgewood Address [redacted]
Teacher Ms. Diaso Phone [redacted]
Date of Meeting April 5, 1978 Plan Developed by X
Implementation Date April 6, 1978
Projected duration of IEP Thru June 1978
Location of file Edgewood School File

Diagnosis Low academic achievement due to behavioral disorders and extreme hyper-reactivity.

Recommendations Supportive, structured classroom.

Placement Special Day Class in supportive, mileau-oriented, residential treatment center.

James S. Dierbe
[redacted]
Mary A. Diaso
???????
Cheryl E. Williams, RN
Herberta G. Chandler, LCSW #175
Paul E. Jobin, Dir. of Ed. Ser. Edgewood
LHTC #13343

**Exhibit 6, page 2**

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
SPECIAL EDUCATIONAL SERVICES
PROGRAMS FOR THE EDUCATIONALLY HANDICAPPED

IEP for Jack Smith

Date April 5, 1978

(1) Present level of performance

(A) Academic achievement

WRAT Reading 2.9 Spelling 2.9 Math 3.9

(B) Social adaptation

Inappropriate for age: poor peer relationships—tends to be scapegoated

(C) Prevocational/vocational skills: appropriate for age

(D) Psychomotor skills: nearly appropriate for age

(E) Self-help skills: appropriate for age

Optional: Speech and language ok for age
Learning styles: Basically no learning modality impairment; but slight residual
Other visual-motor directionality prob.

(2) Prioritized long range goals/periodic annual objectives

(1) Increase attention span to allow for total on task behavior for 25 minute intervals.

(2) Jack will demonstrate ability to name, add and subtract simple fractions with accuracy.

(B) Short-term objectives: by June 16, 1978 as measured by T-made test.

(3)(A) Special education and related services.

(B) Special Instructional Measurements Occ. Ther. psychotherapeutic and behavioral services offered by residential treatment center.



(1) Screens to limit distractability.
Career and Vocational Education Program

(D) No special instruction offered in program.
Rationale for Educational Placement

(6) Jack requires *constant* monitoring and supervision in as close to a stimulus-free environment as possible so that his busyness can be controlled. Inadequate social skills need the intensive focus of residential placement.

**Exhibit 6, P. 3**

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
SPECIAL EDUCATION SERVICES

Individualized Educational Program

For Jack Smith

SHORT TERM OBJECTIVES

School: Edgewood Year 77 to 78 Special Ed. Teacher:

| | Short Term Objectives Specify Time, Behavior, Evaluation Criteria and Procedures | Intervention Activities and Materials | Person(s) Responsible For Implementing |
|---|---|---|---|
| I | Behavior: | | |
| | 1. Jack will demonstrate ability to remain on task for 10 mins. when isolated working on independent activities by May 1, 1978. | Teacher observation and time piece. Seat work must be of an independent nature needing no teacher instruction. | Ms. Diaso |
| | 2. Jack will demonstrate ability to remain on task for 15 mins. when isolated working on independent activities by June 12, 1978. | Teacher observation and clock. | Ms. Diaso |
| II | Academics: | | |
| | 1) Jack will demonstrate mastery of concept of fractions by producing upon request fractional representations of a whole with 90% accuracy by April 15, 1978. | 1-1 Jack will spend 30 mins. 4 times a week working in either text, T-made sheets or manipulative visual aids | Ms. Diaso |
| | 2) Jack will demonstrate ability to add simple fractions on T-made Test with 90% accuracy by May 1, 1978. | 2-1 Jack will spend 30 mins. 4 times a week in class working on fractions either in state text or T-made supplemental sheets. | Ms. Diaso |
| | 3) Jack will demonstrate ability to subtract simple fractions with 90% accuracy on T-made test by June. | | |



**Exhibit 7, Page 1**

San Francisco Unified School District
Services to Students
Individualized Education Program (IEP)

Smith, Jack, M, HO 74030125, 7-10-67, 11.5

Student, Sex, ID. No., Birthdate, C.A.

[redacted]

Grand Parent/Guardian, Address, Phone

6, Merilyn Hand, 1-12-78

Grade, Teacher, Date of Meeting

English, No

Primary Language of Home, Interpreter Required

1-12-78, 1-12-80

Implementation Date, I.E.P. Review Date

Current Levels of Educational Performance

Academic Achievement (include level of cognitive functioning as needed.)

WRAT 12-6-78 Reading 3.9
Spelling 3.7
Arithmetic 4.7

CTBS 4-78: Reading 5.0
Math 7.0

Communication

Appropriate for age.

Social adaption/Behavior characteristics

Hyperactive, distractable, poor peer relationships—tends to be scapegoated.

Prevocational and Vocational Skills

n-a

Psychomotor Skills

Appropriate for age

Self-help Skills

Appropriate for age

Implementation information

Learning/teaching styles (rate, modality etc.)

Visual Learner—has difficulty with too much auditory stimuli. Some visual-motor directionality difficulty—may be due to impulsive task attack.

Too fast in most work

Learning environment, interaction, location etc. Low stimuli, structured environment providing one-to-one attention.

Special instructional media & materials—May need screens to limit distractability

Effective reinforcers—Extra dot period or free time drawing.

Student interests, talents etc. Story-telling, and writing-drawing.

Behavior strengths—Wants to succeed, can be motivated, is very bright and can be warm, friendly and considerate.



**Exhibit 7, Page 2**

| | | |
|---|---|---|
| SDC Residential Treatment Center<br>Educational Placement | Continuation<br>Placement Date | 1 yr.<br>Projected<br>Duration |

Requires constant monitoring and support of residential placement
Rationale for Placement (least restrictive concept)

Explore transition program by Sept. 1979
Extent of Regular Class Placement

Consultation during and post transition program.
Services to be Provided to Regular Teacher

| | |
|---|---|
| Regular<br>Physical Education Program | n/a<br>Prevocational/Vocational Program |

Approve
I.E.P.

Committee members

| | |
|---|---|
| Administrator Paul E. Jobin LHTC #13343 | X |
| Parent/Guardian [redacted] | X |
| Teacher | |
| Special Education Teacher Marilyn Hand TCLH #127855 | X |
| Psychologist ?? ???? ???? Ph.D. 3165PSL | X |
| Pupil Services Worker Cheryl S. Price So Wker | X |
| Nurse Helen E. Merica, R.N. | X |
| Speech/Language Specialist | |
| Physician | |
| Student | |

Signatures also in attendance

Dissenting Statement Attached Yes ☐

**Exhibit 7, Page 3**

Long Range Goal: Improved skills in all areas of reading.

Periodic Objective(s): To the beginning 6th grade level or above.

Time: By January, 1980.

Evaluation Conditions: In a special day classroom, structured environment.

Observed Behavior: Reading grade level materials—SRA and Merrill Textbooks.

Criteria: With 85% accuracy in comprehension.

Person Responsible: Teacher and classroom counselor.

Long Range Goal: Improved skills in written language.

Periodic Objective(s): By demonstrating correct punctuation skills at the 5th grade level, and spelling skills at the 5th grade level.

Time: By January, 1980.

Evaluation Conditions: In a special day classroom, structured environment.

Observed Behavior: By working a creative story on a teacher generated topic.

Criteria: With 80% accuracy in punctuation and spelling skills.

Person Responsible: Teacher and classroom counselor.

Long Range Goal: Improved attention span on task.

Periodic Objective(s): For an uninterrupted time span of 40 minutes.

Time: By January, 1980.

Evaluation Conditions: In a special day classroom-structured environment.

Observed Behavior: By *not* calling out or getting up inappropriately.

Criteria: By observation of teacher, aide and/or evaluator.

Person Responsible: Teacher, classroom counselor.



**Exhibit 8**

A. P. GIANNINI MIDDLE SCHOOL
3151 Ortega Street
San Fran., Ca. 94122

Nov. 5, 1980

Mr. and Mrs. [redacted]
[redacted]
San Fran., Calif. 94116

Dear Mr. and Mrs. [redacted]

Thank you so much for your continued interest in aiding Jack here at school. Your support is very helpful to Jack and the staff here at school.

As we discussed at yesterday's meeting, I promised you a resumé of the conference.

PRESENT: Mr. & Mrs. [redacted] Miss Toomey, Mrs. Aalborg, Mr. Rosenblatt, Mr. Cassilagio, and Mr. Henneberry.

*REVIEW*: (Jack lives with grandparents. Legal custody retained by Alameda County.)

1. Last spring Jack was on a part day program. His performance did not warrant a full day at that time.

2. Miss Toomey and Mr. Cassilagio tried him on a full day in September, 1980. It was not successful.

3. The legal aspects of the number of teacher contacts in Jack's Special Ed. (LDG) class led to the addition of another teacher and division of Miss Toomey's class.

4. It was felt that this natural division presented an excellent opportunity for Jack to be with another teacher, since September and October were not especially successful.

**Exhibit 8, Page 2**

5. Mr. Rosenblatt reviewed Jack's record which included—

Cutting classes
Pulling a fire alarm
Asking for money (threat of force)
Sexual remarks and notes to girls
(Latest sexual reference to girl this day—Nov. 4)

6. We feel we have utilized all the resources available here at school. The consensus of teacher, counselor and administrative opinion is that Jack acts impulsively. He really doesn't plan to do the things he does.

7. Two weeks of successful conduct will lead to the addition of a period for Jack. Each additional 2 week period will add a period.

8. Nov. 6 represents Jack's last chance for successful compliance at A. P. Giannini. Any further referrals/disturbances on his part will lead to suspension and referral to Student Placement Committee for placement in another educational setting.

9. We recommend that Mr. & Mrs. [redacted] and the Social Worker contact the Adolescent Day Treatment Center, 4319 Geary Blvd., San Francisco 94118, 386-3280. This facility offers structured treatment and educational day program for severely disturbed adolescents.

Yours truly,

W. Henneberry
Asst. Principal

WH/nl

cc Miss Barrett
Diane Young



**Exhibit 9**

San Francisco Unified School District
Notice of Suspension

School: A. P. Giannini Middle

School No.: 404, Date: 11-14-80

Student's Name: Jack Smith

Student Number: HO 08118768

Grade: 8; Homeroom 217

Date of Birth: 7-10-67

Ethnic Code: OW; Male: X
Female

Parent/Guardian: Mr and Mr. [redacted]

Address: [redacted]

Zip Code: 94116

Telephone: [redacted]

Number of School Days Suspended: 5

To Return on: Monday, November 24 at the start of the school day.

Previous Suspensions This School Year: 0

No. of Days:

Reason For Suspension: State Education Code 48900 Item H (see Reverse Side)

Disrupted school activities.

Use of sexual remark to girls and sexual gestures

Has the student been afforded due process prior to issuing this suspension?

Yes
See reverse side. Due Process Clause.

State Education Code 48900 "F" Parents or guardians of any pupil shall respond without delay to any request from school officials to attend a conference regarding their child's behavior while on school grounds or during an activity off school grounds related to school attendance.

Your are hereby requested to attend a conference with Mr. Henneberry on Monday, November 17, Time, 9:00, at Counseling Office.

If this date is not convenient, please telephone_____.

Referred to pupil services: Yes X No

Homework assignments will be provided.

Pupil is not to be on or near the school campus during the period of suspension.

Parent contacted by Mr. Rosenblatt

Date of contact 11-14-80

Method of contact: Telephone X

M. BARRATT
Principal



**Exhibit 10**

San Francisco Unified School District
Special Programs and Services
Supportive Services
1512 Golden Gate Avenue
San Francisco, CA 94115
Student Placement Committee Referral

School Identification Number: 404
Date: November 17, 1980

Request for Review: Check one only
Exemption ___ Expulsion ___ Exclusion ___ Part Day ___
Emergency Evaluation Center _X_ Home Teaching ___
Unity Junior High ___
Downtown High ___ Opportunity High ___ Other ___

| Jack Smith | OW | A. P. Giannini |
|---|---|---|
| Name of Child | Ethnic Code | School |
| 8 [redacted] | 7-10-67 | [redacted] 94116 |
| Grade Phone | Date of Birth | Address Zip |
| E 008118763 | | Mr. & Mrs. [redacted] |
| Student Identification Number | | Parent or Guardian |

Is the student currently in one of the following Special Education Programs?
Please designate: EH___ LDG_X_ EMH___ OTHER___
(Please Attach I.E.P. To Referral)

Was the child assigned by Student Placement? Yes No X
Has the parent been notified of this referral? Yes X No
Total days of suspension this school year Five (this referral)
Method of parent contact: Conference Letter
Telegram Phone

Reason for Request: (Document with attachments if necessary) Date of Incident:

Since the start of the school year Jack has admittedly extorted monies, pulled the school fire alarm, stolen various things and has been making sexually suggestive remarks to girls. Jack has

**Exhibit 10, Page 2**

been on a part day program. The school has exhausted all its resources.

Indicate Student's Strength and Weaknesses:

Jack's actions seem beyond his control. He always admits what he does and is sorry afterward. He cannot deal with his peers although academically is fine.

School Resources Utilized:

1. Conferences (indicate number):
   Teacher-Parent 3 Administrator-Student-Parent 4
   S.A.T. ___ School Site Appeals Board ___
   Agency ___

   Conclusions and Results: 874-7605

Jack lives with his grandparents and is a dependent of the Alameda Court, Diane Young social worker. Jack was removed from the Edgewood Home School against the wishes of the Edgewood School and our school last year. It is the opinion of the staff at Giannini that Jack be placed in a special education program (example—TEC). Until the final meeting with Jack's grandparents they were totally opposed to his removal from our school and even a part day program here. (Dr. Jane Rowe, Psychiatrist 731-5113)

2. Referrals (indicate number):
   To S.A.T. ___ To Community Agencies ___
   To Counselors ___ Other _____
3. Attach reports from involved staff:
4. Attach Anecdotal Report (Current semester ONLY)
5. Attach Transcript of Grades and Current Progress Report

Note: All exemptions and part-day assignments for less than a minimum day must have a written request from the parent.

Recommendation by School Staffing Committee:

Request by:

M. BARRETT
Principal

JOSEPH ROSENBLATT
Name of Person Preparing Referral



**Exhibit 11**

Frank J. Gorman, M.A.
A Psychological Corporation
377 West Partal Avenue
San Francisco, California 94127
(415) 665-0777

REPORT OF PSYCHOLOGICAL EXAMINATION

March 9, 1976

Jack Smith
Male: age, 8:7

Jack was referred for psychological evaluation by Louis M. Flohr, M.D. He lives with his paternal grandfather and step-grandmother who are reported in considerable and frequent disagreement about how Jack should be treated. He was described as very bright, very impulsive and overly active. General psychological evaluation was requested.

I saw Jack three times. The first appointment occurred on February 14, 1976 and Jack and his grandfather arrived about twenty minutes late. Nevertheless, Jack and I began the Wechsler Intelligence Scale for Children (WISC) and made good progress despite his almost immediate bursts of activity and verbal attack. He was very impatient, competitive, demanding but at the same time was friendly with me. He also invented a small game he could play while he responded to questions. We met again on February 21, 1976. Jack told me he had been angry the week before when he was yelling at me but was going to be better today so he would not have to come back again. We completed all but one subtest of the WISC in an hour-long meeting. Then, after an hour's interval, we resumed work and finished the WISC, the Bender Visual Motor Test under three sets of instructions, and the Beery Developmental Test of Visual Motor Integration (VMI). During those final two meetings Jack was more cooperative, he did work hard, and he did do better. But he continued to be excited, active and impatient and there were variations in the degree of cooperativeness.

*Test Results*

Jack began the WISC with the Information subtest. At the average level he encountered an item whose answer he did not know; his verbal attacks on me followed immediately, and then shortly were displaced to include the test materials. He earned an average score. When we finished and began the first, easy items of the next subtest, Comprehension, he settled down quickly and gave good answers, earning an above-average score. But the same sort of sequence was repeated through the next three Verbal subtests. Each time he earned an average score, each time he encountered difficulty around the average level, each time he spent energy in attacking. On the Similarities items he also offered differences when he did not know a pertinent similarity. Toward the end of that subtest, and the end of our meeting, I said, "If you yell and scream, maybe I won't notice that you don't know." he grinned at me.

When we met a week later Jack explained his attacks of the preceding week, saying he was angry with me and wanted to do other things than just answer questions. We began testing with the Vocabulary subtest. He displayed an erratic pattern of success and failure on his way to an average score. But then on the Picture Completion items a sudden run of success above the average level earned him a superior level score. On the next task, Picture Arrangement, he was very eager to do the problems, announced early in the subtest that "First, I thinked," then quickly became overtly over-confident, "These are simple," and dropped to an average score. He made several comments asking whether or not he had correct solutions. That concern persisted on the next two subtests, Block Design and Object Assembly, where he again earned superior level scores even though he was at times frustrated and exasperated. His eagerness persisted into the Coding subtest but there his score dropped sharply, falling to the borderline level. There were pauses, erasures, and distractions, but what penalized him the most was that he interchanged two of the symbols and scored six errors in his first ten entries on that subtest.

He earned a WISC Verbal score of 103, a Performance score of 111, and a Full Scale IQ of 107.



Jack's cooperation on the Bender initially left something to be desired as he made rather careless reproductions of the designs. In fact, there was little or no attempt even to preverve the gestalt of two of the designs. In contrast, on other designs he made quite acceptable reproductions, but there were a number of errors involving integration, number awareness, rotation and maintaining directionality. When I began the second version of the Bender, asking that he draw the designs as rapidly as possible, I also stressed my wish that he *copy* the designs. Jack was more responsive then to the instructions, he exerted more control and was more careful, and yet worked at a faster pace. The quality of his reproductions was much better but the errors were about the same in number and involved the same skills. His performance was about a year behind his chronological age.

Then, without forewarning, I asked him to reproduce as many of the designs as he could from memory. He expressed his displeasure, he attempted to distract our attention from the immediate task, he displaced his distress on to the ticking clock, but he recalled eight of the nine designs, an impressive performance relative to memory. The design he did not recall was one he had rotated previously. In quality his reproductions were good but sometimes simplified. His errors were in the same skills as on earlier versions but in addition he made a lateral reversal, which he corrected but then he erased the correct version and left the reversal.

On the VMI he made errors on two relatively easy designs but I thought they resulted from sheer carelessness. Apart from that, he exectuted the designs well. He achieved an age-equivalent score of seven years, ten months, but the lag was a direct result of the early carelessness.

**Conclusions**

I have no question that Jack is a bright youngster. He has at least well-above-average intellectual capacity; the occurrence of several scores at the superior level makes me optimistic that his intelligence may emerge ultimately even at the superior level. But I have no doubt that his ability is at least well above the average level.

But he did not function at so high a level. In fact, much of his functioning was at the average level and in one instance well below the average. I thought it quite clear that the impairment in his intellectual functioning was clearly emotional in origin and often substantial in degree.

His perceptual-motor skills, apart from the impact of superficial carelessness, are probably at age level. A number of skill areas give Jack trouble; perhaps most important is that of number awareness. But if he does pay attention to those skills, he can perform well. I doubt that any action is needed in this area of functioning at present.

It was clear in Jack's behavior around the cognitive materials that he is quite tense and anxious, that the anxiety was readily and often immediately translated into aggressive action, supported by rationalization and displacement. It was also clear that his anxiety often, though not always, interfered with his capacity for evaluating the quality of his own performance. I thought it was apparent that Jack fears failure and the attendant vulnerability or exposure to potential rejection and that he attempts frequently to counteract that possible reaction from others by inviting their rejection on other grounds, i.e., his aggression. I thought, too, that once he begins being aggressive that he cannot always then assert adequate control over his aggressive impulses.

/s/ FRANK J. GORMAN
Frank J. Gorman
Clinical Psychologist
California License PL 1993



**Exhibit 12**

**EDGEWOOD**

Date of birth: 7-10-67
C.A.: 11.5
Grade: 5.4
Date of admission: 12.1.76
Date of this review: December 8, 1978

*Behavior and Attitude*

Jack has been basically quite a good student this year. He is able to stay seated, quiet and concentrated for periods of up to 30 minutes, especially on a task he enjoys. He is still hyper-reactive, unreflective and inappropriate when faced with stressful, overly-stimulating or negative events.

Jack is an excellent example of the power of the "Pygmallion Effect" or, the self-fulfilling prophecy. He evidently performs at his grandparents' level of expectations academically, when under stress (such as test situation) or with them, but functions adequate at the 5th or 6th grade level with me and in a non-stressful situation. (Contingent upon how "pulled together" internally he is at the time.) There is no doubt in my mind that precisly because he is so "reactive" to others and the environment, he will respond to the situation according to the verbal or non-verbal expectations of meaningful people. Jack appears berift of a meaningful "self" who is manifested in his desire to be an actor . . . an occupation in which a "self" is easy to find in different roles. I sense in him a great void.

Jack can be motivated, concentrated and appropriate at times. He is very bright and curious. His energy can be redirected toward himself and away from being re-active to external situations when he is interested and motivated. How others, especially authority figures view him, is crucial in the process of helping Jack to contact his own center and sense of autonomy.

Name: Jack Smith
File No.: 6425
Date: Dec. 8, 1979
Signature: Merilyn Hand, Teacher
LHTC #12789

*Academic Achievement*

| WRAT-Intake | 11.2.76 | 10.15.77 | 12.6.78 | Overall Improvement |
|---|---|---|---|---|
| Grade Level | 3.2 | 4.1 | 5.3 | |
| Word Recognition | 2.1 | 2.9 | 3.9 | +1.8 |
| Spelling | 2.3 | 2.9 | 3.9 | +1.6 |
| Arithmetic | 2.0 | 3.9 | 4.7 | +1.7 |

New Developmental Reading Test

| | 4.20.77 | 5.2.78 | |
|---|---|---|---|
| Grade Level | 3.8 | 4.8 | +.1 |
| Overall Reading | 3.8 | 3.9 | |

CASE = Spring 1978 Overall Reading 5.0
Overall Math 7.0

Reading, spelling and mathematical errors are all due to excessive impulsivity and too rapid task attack. This noticeably decreases when he is interested in the content of what he is exploring. Inner chaos results in externalized chaos, no matter what academic area is being explored. Generally, the types of errors made are the same—inattentive mistakes, substitutions, omissions, reversal of combinations of numbers or letters. Auditory channels are deficient in the screening thus resulting in misunderstood directions, sounds and sequences. Again, this is due to distractability and hyper-reactivity. Jack presents few problems in understanding and retaining information, comprehension of ideas or sequences of thought, when attentive. No conceptual deficits are evident.



**Exhibit 13**

University of California
San Francisco Medical Center
Pediatric Outpatient Clinics

Child Study Unit
Developmental Assessment

Date: 9/21/79

Name: Smith, Jack

Unit No: 42 81 47-1

Birthdate: 6/10767

Age: 12 years, 3 months

Address: San Francisco Telephone:

School Grade: School:

Referred by: Dr. Jane Rowe

Problem: Re-evaluation. Jack was seen previously in the Child Study Unit four years ago. At that time he had been removed from his parents' home and was living with his grandparents. See report dated 9/16/75. He attended public school, then Edgewood. He now plans to return to public school, and the question of class placement is under consideration.

Previous Tests:

9/75 CSU Tests were incomplete. Scores are included with present tests where appropriate.

Edgewood: Periodic tests showed improvement in basic skills. Wide variability in performance level is noted, depending on his feeling of stress and consequent breakdown of impulse control. "He can be motivated, concentrated, and appropriate at times."

Present Tests: WISC-R Bender (Koppitz norms)

Discussion: Jack is an attractive 12 year old, who seems bright, lively, and winning. He appeared at first, ambitious, perhaps overly ambitious, trying for a precise answer, sometimes

changing a correct answer to an incorrect one in a moment of self-doubt. As time passed he became more playful with me and more rushed and careless in his test work. He criticized the questions, dramatized his responses instead of stating them directly. His movements became wider and less controlled. It was my impression that his tolerance for test-taking was practically exhausted.

On the general aptitude test Jack's scores are today much as they were four years ago. He works mainly in the normal range, with usually better performance in non-verbal than in verbal areas of thinking. I felt that, on puzzles of various kinds, he was well aware of the special relationship, and that, even when he distracted himself with talk and a variety of extraneous thoughts, he was able to work well on this kind of task. A single exception was one much like writing, the rapid copying of small figures with a pencil (Coding). Though he was ambitious, his work was slow, and lacked the rhythmic, smooth style that is needed to turn in a good performance. He reversed one of the figures, and this also slowed him as he attempted to repair it. His pencil copies of the Bender designs are also slightly below average expectation for a person his age.

Jack's verbal work was mainly within the average range. He included a lot of joking comments and personal reference in his responses to questions.

But he showed satisfactory ability to organize his ideas in most instances, in spite of these drawbacks to test performance.

Summary:

Jack has shown marked improvement in his behavior during the four years since he was last seen in the Child Study Unit. He is much better able to attend and to persist at a task, much more easily motivated to try. His work today shows clearly that he functions in most areas within the normal range of general aptitude, and that he has slightly greater ability in non-verbal areas of thinking than in verbal areas. He has persisting difficulty with paper-and-pencil work which may be what remains of an earlier lag in visual-motor development. Probably his greatest handicap in the classroom, however, is his marked uneasiness and distractability. As his teachers have reported, his self-control is



still tenuous, and, under stress, tends to break down. He still needs special classroom arrangements in order to learn.

Sally Dean, M.A.
Pediatric Psychologist
Child Study Unit

**Exhibit 13, Page 3**

TEST RESULTS
Smith, Jack
42 81 47-1
6/10/67
GRADE:
DATE OF TESTING: 9/21/79

WECHSLER INTELLIGENCE SCALE
FOR CHILDREN—(R)

| Verbal Subtests | Scaled Score | ('75) | Performance Subtests | Scaled Score | ('75) |
|---|---|---|---|---|---|
| Information | 7 | | Picture Completion | 12 | 9 |
| Similarities | 8 | | Picture Arrangement | 10 | |
| Arithmetic | 8 | | Block Design | 10 | 11 |
| Vocabulary | 9 | 9? | Object Assembly | 13 | |
| Comprehension | 9 | | Coding | 7 | |
| (Digit Span) | | | (Mazes) | | |

Verbal IQ: 88 Performance IQ: 102 Full Scale IQ: 94

WIDE RANGE ACHIEVEMENT TEST

| | Grade Equivalent | Percentile | Standard Sc |
|---|---|---|---|
| Reading | | | |
| Spelling | | | |
| Mathematics | | | |

Bender Visual-Motor Gestalt Test
Age Equivalent Score: 9-10 years

| Wide Range Achievement Test | 11/76 | 10/77 | 12/78 |
|---|---|---|---|
| Reading (single words) Grade | 2.1 | 2.9 | 3.9 |
| Spelling Grade | 2.3 | 2.9 | 3.9 |
| Arithmetic Grade | 3.0 | 3.9 | 4.7 |

| New Developmental Achievement Test | 4/77 | 5/78 |
|---|---|---|
| Overall reading grade | 3.8 | 3.9 |

| CTBS | Spring-1978 |
|---|---|
| Overall reading | 5.0 |
| Overall math | 7.0 |



**Exhibit 14, Page 1**

Jane S. Rowe, M.D.
1125 Irving Street
San Francisco, California 94122
Telephone 731-5113

October 12, 1979

Mr. E. Cassilagio
A. P. Giannini Middle School
3151 Ortega Street
San Francisco, CA

RE: Smith, Jack

Dear Mr. Cassilagio:

Jack Smith, a 12 year old 7th grader at Giannini Middle School, has recently been evaluated by me and at the Child Study Unit at the University of California, San Francisco. His grandparents asked for this evaluation because they are concerned about Jack's slow academic progress.

The following were done: medical history and detailed neurological examination, electroencephalogram (EEG), psychological testing, educational evaluation and family interview. As a result, we have collected some information concerning Jack's school status and would like to share it with you in this letter.

Jack's early pediatric history is unremarkable. His development was normal. There were several episodes of trauma, including head trauma, before age 6. Home life was stormy. Jack has lived with Mr. and Mrs. [redacted], his paternal grandparents, since age 8. He has had academic problems and behavioral problems throughout his school career. He was on medication for hyperactivity for a short time.

For the past 2½ years Jack has been a student at Edgewood Learning Center in San Francisco. During that time, according to testing done at UCSF and at Edgewood, his behavior improved markedly. he is now able to sit still and work on a task with much less distractability than in the past. According to test results from Edgewood (WRAT), Jack improved 1.6 to 1.8 grades in Word

Recognition, Spelling and Arithmetic between 11/76 and 12/78. A summary of WRAT scores is:

| | 11/2/76 | 10/15/77 | 12/6/78 | 9/79 |
|---|---|---|---|---|
| Actual grade level | 3.2 | 4.1 | 5.3 | 7.0 |
| Reading | 2.1 | 2.9 | 3.9 | 3.9 |
| Spelling | 2.3 | 2.9 | 3.9 | 4.3 |
| Arithmetic | 3.0 | 3.9 | 4.7 | 5.2 |

Mrs. Alice Whitsell, educational specialist at the Child Study Unit, UCSF, felt that although Jack has a high interest level, his low tolerance for frustration and his insecurity in academic work will make it impossible for him to succeed in a regular classroom. (See enclosed report.)

Psychological testing was done at the Child Study Unit by Mrs. Sarah Dean. Jack's overall intelligence is normal with even abilities in all areas tested. There was evidence of some difficulty in maintaining his attention during the testing, although he obviously desired to perform well. (See enclosed report.)

On detailed neurological examination, Jack showed minor development delay. He has difficulty balancing on one foot and cannot skip. There is some clumsiness on tasks requiring fine motor coordination. There are associated movements and evidence of rostral dominance. EEG was done 8/9/79 at UCSF was normal. This examination suggest neurodevelopmental delay.

Mr. and Mrs. [redacted] are most anxious for Jack to obtain a good education.

In summary, this is a 12 year old boy of normal intelligence with neurodevelopmental lags. He has a history of hyperactive behavior and still has some impulsivity and low tolerance for frustration. He is at least two grade levels behind in all core academic subjects. Jack greatly desires to be successful.

It is the feeling of those who participated in this evaluation that Jack must have special classes in all basic academic subjects. He needs close supervision in a small class setting in order to improve academic skills. We feel that his emotional stability at this point depends upon feeling successful at school, which in turn will require appropriate teaching.



I have offered to continue to see the family for counseling during this transitional phase if they wish.

I hope we will be able to sit down together soon to discuss an individualized educational plan for Jack.

Sincerely,

/s/ JANE S. ROWE, M.D.
Jane S. Rowe, M.D.

Encls.

JSR/nc

**Exhibit 14, Page 3**

University of California, San Francisco

Hospitals and Clinics
Jack Smith
B.D. 6/10/67
Giannini Jr. High
7th grade
San Francisco, California 94143
Ref. by Jane Rowe, M.D.
Seen: 9/25/79

San Francisco, CA 94143
Ref. by Jane Rowe, M.D.
Seen: 9/25/79

## EDUCATIONAL EVALUATION

Jack has been a resident student at Edgewood for 3 years. Both he and grandmother feel he is not getting the academic education he needs and therefore he has been enrolled at Giannini Middle School at 7th grade level.

On the Wide Range Achievement Test he received the following scores:

Reading 3.9

Spelling 4.0

Arithmetic 5.2

His written expression and handwriting are about 4th grade level.

Throughout the session, he was restless and very concerned. "Is it OK?"—"Did I do well?"—"Do you make mistakes too?"

Grandmother said, "He picks up a book, starts it, drops it." His interests are above the level at which he can read successfully.



My concern is whether or not he can be placed in a class (classes) appropriate to his skill level and thus allow him to succeed and advance academically. He surely will fail in any regular class at 7th grade level. He is motivated to learn but so very fragile emotionally.

/s/ ALICE J. WHITSELL
Alice J. Whitsell, Director
Reading and Language
Development Clinic

**Exhibit 15**

San Francisco Unified School District
Pupil Services
Student Placement Committee
1512 Golden Gate Avenue
San Francisco, CA 94115
565-9704

November 21, 1980

Mr. and Mrs. [redacted]
[redacted]
[redacted]

Re: Jack Smith
Bd: 7-10-67

Dear Mr. and Mrs. [redacted]

This letter is to notify you of the Student Placement Committee's exclusion
decision to recommend the ~~expulsion~~ of Jack from the San Francisco Unified School District. The action taken is in compliance with California Education Code Section 48900 and the San Francisco Board of Education Policy #5114 on Student Discipline. While this action is regrettable, the recommendation is necessary because of the seriousness of the alleged charge.
Item B, G & H .

Extortion, stealing, disruptive behavior, pulling fire alarm, suggestive sexual remarks.

During the time required for review of our recommendation, Jack will continue to be on suspension from school as authorized in California Education Code, Section 48903(H) pending final action on this case. You may request class assignments by calling the Counseling Office of his school.

In order that you may be provided an opportunity to participate in the discussion involving the case, you and the student are requested to attend a hearing of the Administrative Hearing Panel held by Chairman of the Student Placement Committee, Mr. Robert R. Figone, of Supportive Services at 1512 Golden Gate



Avenue (between Pierce and Scott Streets) parking available, at Tuesday, December 2, 1980 at 11:00 a.m.

At that time, you have the opportunity to:

1. Appear in person or to employ and be represented by counsel.
2. Inspect and obtain copies of all documents to be used at the hearing.
3. Confront and question all witnesses who testify at the hearing.
4. Question all other evidence presented.
5. Present oral and documentary evidence on the pupil's behalf, including witnesses.

Please let Mr. Figone know whether the scheduled time is convenient and whether or not you wish to take this opportunity to meet with the Hearing Panel. Please contact the Student Placement Office at 565-9704.

Thank you.

CERTIFIED MAIL #9986488

Sincerely,

/s/ JUANITA SMITH
Juanity Smith, Program Manager, Supportive Services

cc: Area Superintendent, Mr. Henry Marshall
Site Principal, Miss Maybeth Barrett, A. P. Giannini
Student, Jack Smith, A. P. Giannini
Special Ed.

DISTRICT RULES PERTAINING TO STUDENT DISCIPLINE AND CALIFORNIA EDUCATION CODE ATTACHED.

**Exhibit 16**

Legal Services for Children, Inc.,
[Letterhead]

November 28, 1980

Robert Figone, Chair
Student Placement Committee
San Francisco Unified School District
1512 Golden Gate Avenue
San Francisco, California 94115

Dear Mr. Figone,

This office represents Jack Smith, a pupil at A.P. Giannini Middle School in the San Francisco Unified School District.

Jack was suspended from Giannini on November 14, 1980, and has not been allowed to return to school since that date. Jack has been referred to the Student Placement Committee by Giannini School for exclusion or expulsion from the District. Jack is a special education pupil, identified as Educationally Handicapped (Learning Disability Group.)

Since Jack is an educationally handicapped student, any change of educational placement for him must be initiated by convening an IEP meeting. Referral to the Student Placement Committee rather than utilization of the special education administrative process violates Federal law.

Therefore, the SPC hearing concerning Jack that is scheduled for 11 A.M., Tuesday, December 2, 1980, should be cancelled, and an IEP meeting convened. In addition, we ask that Jack be returned to his current educational placement at A.P. Giannini until an IEP meeting can be held to discuss and decide upon an appropriate program for him.



Please let me know immediately when the IEP meeting will be held.

Cordially,
Susan Spelletich,
Attorney for Jack Smith

cc: Martha Scott, Esq.
Charlton Holland, Deputy Attorney General
Gail Imobersteg, Legal Counsel
Dr. Wilson Riles, Superintendent of Public Instruction,
Calif. Dept. of Education
Dr. Robert Alioto, Superintendent, SFUSD
Bill Maher, President, Board of Education
Principal, A.P. Giannini Middle School

**Exhibit 17**

Legal Services for Children, Inc.
[LETTERHEAD]

December 8, 1980

Mr. Robert Figone, Chair
Student Placement Committee
San Francisco Unified School District
1512 Golden Gate Avenue
San Francisco, CA 94115

Re: Jack Smith, d.o.b. 7/10/67

Dear Mr. Figone:

I am writing this letter to you in order to document and confirm our conversation regarding the above-named client, as well as to summarize the actions I understand have been taken by your office since Jack Smith's referral to the Student Placement Committee.

As you know, Jack was suspended (for five days) from A. P. Giannini Middle School on Friday, November 14, 1980. When Jack returned to Giannini on Friday, November 24, he was told to leave school and return home, as the matter had been referred to the Student Placement Committee as of November 17. An SPC meeting had been scheduled for Tuesday, December 2, so that the possibility of Jack's exclusion from the San Francisco Unified School District could be discussed.

On November 28, Ms. Susan Spelletich, attorney for Legal Services for Children, Inc., and counsel for Jack, wrote you a letter stating that "since Jack is an educationally handicapped student, any change of educational placement for him must be initiated by convening an IEP meeting." In her letter, Ms. Spelletich also stated that a referral of this type to the Student Placement Committee rather than utilization of the special education administrative process violated federal law, and she therefore requested an immediate IEP meeting. As of this date no IEP meeting has in fact been scheduled.



On Monday, December 1, I visited your office and we discussed Jack's situation. At that time I explained that it was also my understanding that because Jack is an educationally handicapped student, any change in placement would have to be done through the convening of a new IEP meeting. I also mentioned that due to Jack's special education status, I did not believe that his referral to your office for exclusion from the school district was appropriate. During our conversation you stated that you were unclear as to what the actual procedures regarding Jack should be. You did indicate that it might be useful to have all the parties concerned meet at your office the following day (December 2) to discuss the issues involved in this matter.

On the afternoon of December 1, we spoke on the telephone and you informed me that the SPC meeting regarding Jack that had been scheduled for the following day (December 2) would be cancelled. I expressed concern at that time about Jack having been out of school since November 14, and because of this I inquired as to when arrangements could be made to resolve Jack's educational situation. At that point you requested that I call your office the following morning.

On the morning of Tuesday, December 2, I telephoned your office and was told by your secretary that you were in a conference and therefore not available. I left a message regarding my inquiry as to what would occur now that the SPC meeting had in fact been cancelled.

On the afternoon of Tuesday, December 2, I had a conversation with Jack's attorney, Ms. Spelletich. She informed me that she had spoken with you about Jack that day and that Jack now had the choice of either returning to his present half-day program at Giannini or receiving the services of a home teacher until an IEP meeting is convened.

On the morning of December 3, I telephoned your office and spoke with you about the message I had received from Ms. Spelletich. During this conversation, you stated that you would be willing to allow Jack to return to a half-day program at Giannini. I mentioned that it was my understanding that home teaching was also an option and that because of the attitudes of certain school

personnel toward Jack, it did not seem appropriate for him to return to Giannini at this time. I therefore requested that Jack be assigned a home teacher as per his and his family's request. The current IEP for Jack calls for maximum LDS attendance and attendance in regular classes and non-academic activities. Sometime in late October, Giannini changed his program to half-day attendance, requiring Jack to leave school daily at 12:30 p.m.. Such change of program is unauthorized without the reconvening of an IEP Committee meeting, as it results in a severely curtailed instructional schedule in a more restrictive environment.

Since your offer to allow Jack to return to classes at Giannini on a half-day basis would return him to a program that is not his "current educational placement" in accordance with his IEP, and a program that was changed arbitrarily and without following proper procedures by the school, we concur in Jack's decision not to return to this patently inappropriate program.

You informed me on December 3, that arrangements would be made for the provision of home teaching services. I also asked to be notified when the home teacher would make her/his first visit to Jack so that I could arrange to be present at that time. You told me that you would give the assigned teacher my name and office phone number so that these arrangements could be made. By accepting home teaching instead of return to Giannini at this time, Jack does not waive any other rights or procedures to which he is entitled as a handicapped student under federal and state law.

Since our conversation on December 3, neither our client nor I have received any information as to when home teaching will in fact begin. Since Jack is an educationally handicapped student, his continuing educational instruction is of the utmost importance. He and his family are quite anxious, as no new IEP meeting has been arranged. The delay in providing a home teacher is an additional and unnecessary source of anxiety and concern to Jack and his family. Jack has already missed fifteen days of school, which is frustrating to him, his family, and me because Jack does, in fact, want very much to receive educational instruction and help.



Because of this, I am again requesting that a home teacher be assigned to Jack as soon as possible; the continued lack of instruction is detrimental to the best interests and needs of our client.

In light of Jack's recent difficulties in relating to young women, I most strongly recommend that he be provided with a male home teacher. Please let me know immediately when a home teacher is assigned. In addition, please let me know when an IEP meeting will be scheduled, and the name of the person who will handle the arrangements for the IEP meeting.

Jack's attorney has read this letter and concurs that it properly reflects her understanding of, and position on, Jack's situation.

Cordially,

/s/ RICHARD CAPURRO
Richard Capurro
Legal Caseworker

/s/ SUSAN SPELLETICH
Susan Spelletich
Attorney for Jack Smith

RC/SS:ab
cc: Robert Alioto

**Exhibit 18**

Jane S. Rowe, M.D.
1128 Irving Street
San Francisco, California 94122
Telephone 731-5113

November 3, 1980

Ms. Diane Young

K; 163
431 Broadway
Oakland, CA 94607

RE: SMITH, JACK

Dear Ms. Young,

As you requested, I am sending my summary of my work with Jack to you for you to send on to Giannini Middle School.

This 13 year old boy is a ward of Alameda County who lives with his paternal grandparents in San Francisco. He has a history of physical abuse and emotional trauma in infancy and early childhood. He was placed at Edgewood Learning Center in San Francisco for 2½ years until Summer, 1979. Since then he has lived with his grandparents and attended Giannini Middle School. Because of disruptive behavior, the school only allowed Jack to attend three classes at the beginning of the 1979-80 school year; his behavior improved so that he was allowed to stay for lunch and one additional class by the end of that year.

This school year Jack has again become disruptive and anti-social and is again on a restricted school day. His grandmother reports that he has stolen money from her, melted plastic toys and teases the pet cat.

This child's diagnoses are attention deficit disorder characterized by short attention span, impulsive behavior, hyperactivity and specific learning disabilities, plus a neurodevelopmental disorder characterized by multiple "soft signs."

My role with Jack has been a mixed one. A traditional psychotherapeutic approach was rejected by Jack's grandparents



and did not seem appropriate to me either, under the circumstances. I have worked with the social worker, the school, the pediatrician, the Child Study Unit at UCSF, the grandparents and Jack himself in an attempt to make Jack's day-by-day life less frustrating, more fulfilling and happier. As an adjunct in dealing with his hyperactive behavior, Jack took Cylert for several months until Summer, 1980, when it was discontinued because of side effects (abnormal liver function tests). The medication had been effective in helping Jack control impulsive behavior.

Our psychotherapeutic relationship is still in a preliminary stage, even after more than a year of contact. This is in part due to lack of continuity, either because of missed appointments or interruptions for immediate concerns. In addition, and most importantly, our work has been slow because of Jack's great difficulty in allowing himself to trust me. Difficulty with this fundamental developmental issue, it appears to me, has precluded his psychological growth in many other areas.

In summary, this is a child with multiple problems, including a history of abuse, attention deficit disorder, learning disabilities, and an extremely difficult home situation. In the past it has been necessary to place him in a residential treatment situation.

At present, Jack has pressing needs in academic and psychological areas. I feel he needs ongoing psychotherapy and an educational program geared to his learning disabilities, preferably in an integrated program.

I would very much like to participate in further discussions concerning plans for Jack.

Sincerely,
/s/ JANE S. ROWE
Jane S. Rowe, M.D.

George Deukmejian, Attorney General
of the State of California
Charlton G. Holland
Asher Rubin
Deputy Attorneys General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-2004
Attorneys for State Defendants

United States District Court
Northern District of California

No. C 80 4270 MHP

John Doe,
Plaintiff,

v.

Bill Maher, Rosario Anaya, Jule C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey and Benjamin Tom, individually and in their capacities as members of the San Francisco United School District Board of Education; Robert Alioto, individually and in his capacity as Superintendent of the San Francisco Unified School District; Robert Figone, individually and in his capacity as Chairperson of the Student Placement Committee of the San Francisco Unified School District; Henry Caruso, individually and in his capacity as Principal of the Louise Lombard School in the San Francisco Unified School District; Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruction, Marybeth Barrett, individually and in her capacity as Principal of the A.P. Giannini School in the San Francisco Unified School District,
Defendants,

Jack Smith,
Plaintiff-Intervenor.

Answer of Defendant Wilson Riles to
Complaint of Plaintiff-Intervenor

[Filed April 8, 1981]



Wilson Riles answers the complaint of intervenor as follows:

1. The first two paragraphs of the complaint are descriptive and defendant therefore neither answers nor denies the allegations of said paragraphs.

2. In answer to the allegations contained in paragraphs 3-6, defendant denies all of said allegations.

3. Defendant lacks sufficient information or belief upon which to admit or deny the allegations contained in paragraphs 6, 7, and 8 of the complaint and therefore denies all of the allegations of said paragraphs.

4. In answer to the allegations contained in paragraphs 15-36, defendant Riles lacks sufficient information or belief upon which to admit or deny said allegations and therefore denies all of the allegations of said paragraphs.

5. Paragraphs 37-48 of the complaint purport to summarize applicable law with respect to education for handicapped students. Insofar as the allegations of said paragraphs are conclusions of law, defendant Riles neither admits nor denies them.

6. Defendant Riles denies the allegations contained in paragraphs 49-66 of the complaint.

## AFFIRMATIVE DEFENSES

7. Plaintiff-intervenor has not exhausted his administrative remedies, and thus with respect to defendant Riles has stated no grounds for relief from this court or for jurisdiction to be vested in this court. Specifically plaintiff has not exhausted the procedures provided by 20 U.S.C. section 1415 and the regulations promulgated in conformity with such title and by chapter 5 of part 30 (commencing with section 56000) of the California Education Code and the regulations promulgated thereunder.

8. This court should abstain until the administrative procedure available to the local defendants and the plaintiff are exhausted.

WHEREFORE defendant Riles prays that the complaint be dismissed, that defendant recover his costs of suit herein, and that the court grant such other relief as to it seems proper.

DATED: April 7, 1981

GEORGE DEUKMEJIAN
Attorney General

CHARLTON G. HOLLAND
Deputy Attorney General

/s/
ASHER RUBIN
Deputy Attorney General

Attorneys for State Defendants



United States District Court
Northern District of California

No. C-80-4270 MHP and
No. C-81-1602 MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor,

vs.

William Maher, et al.,
Defendants.

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John Roe,
Plaintiff,

vs.

Wilson Riles, et al.,
Defendants.

## OPINION

[Filed May 25, 1982]

In both *Doe v. Maher,* C-80-4270 MHP, and *Roe v. Riles,* C-81-1602 MHP, plaintiff is the same individual. These cases involve issues surrounding the educational placement of plaintiff. At a hearing on November 9, 1981, this court requested briefing by the parties on two issues: the availability of damages in *Doe v. Maher,* and the availability of attorneys' fees in *Roe v. Riles.* Since the legal issues in the two cases overlap, they will be discussed together herein.

*EDUCATION OF ALL HANDICAPPED CHILDREN ACT*

Plaintiff seeks damages in *Doe v. Maher*[1] under the Education of All Handicapped Children Act, 20 U.S.C. §§ 1401 et seq. (hereinafter the "EHA"). The EHA is an enactment pursuant to Congress' spending power,[2] wherein a state can receive monies to fund education for the handicapped if the state fulfills certain requirements. One of those requirements is that the recipient state provide each handicapped child with a "free appropriate education." 20 U.S.C. § 1412(2)(B). The state must also ensure that certain procedural protections are afforded the handicapped child who seeks such an education. 20 U.S.C. § 1415. These procedural safeguards culminate in a private right of action, in which the court is empowered to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

This court concludes that appropriate relief in this case does not encompass damages.[3] This conclusion is supported by the language of the statute and the legislative history.[4] The judicial relief section appears to be the last of many procedural safeguards

[1] It is unclear whether plaintiff seeks attorneys' fees in *Roe v. Riles* pursuant to the Education of All Handicapped Children Act, 20 U.S.C. §§ 1401 et seq. The court is of the opinion that fees were not contemplated by Congress as appropriate relief. *See Anderson v. Thompson*, 658 F.2d 1205, 1217 (7th Cir. 1981). However, it is unnecessary to decide the issue given this court's decision concerning § 505 of the Rehabilitation Act, 29 U.S.C. § 794a, *infra*.

[2] As discussed below, the EHA also rests partially on Congress' power to enforce the fourteenth amendment pursuant to § 5. *See* S. Conf. Rep. 455, 94th Cong., 1st Sess. 28-29, *reprinted in* 1975 U.S. Code Cong. & Ad. News, 1480, 1482.

[3] This conclusion does not preclude recovery for damages in exceptional circumstances such as to reimburse parents for the costs of services the district is required but failed to provide. Damages may also be recovered where the district acted in bad faith. However, absent such exceptional circumstances plaintiff is not entitled to a damage remedy. *See Anderson v. Thompson*, 658 F.2d at 1214.

[4] An analysis under *Cort v. Ash*, 422 U.S. 66 (1975), is not appropriate. The question here is the type of relief available, not the existence of a private right of action. *Anderson v. Thompson*, 658 F.2d at 1210 n.10. *See also Miener v. Missouri*, No. 80-1971 (8th Cir. Feb. 4, 1982).



in a section aimed at ensuring proper placements and programs for handicapped children .... [T]he context makes clear that "appropriate" relief was generally intended to be restricted to injunctive relief, the statutory language giving the district judge wide latitude to fashion an individualized education program for the child. *Anderson v. Thompson*, 658 F.2d 1205, 1211 (7th Cir. 1981). *Accord, Miener v. Missouri*, No. 80-1971 (8th Cir. Feb. 4, 1982).

This reading of the statute to provide only injunctive relief is supported by the legislative history. There is no discussion directly on the question of a damages remedy. However, the committee reports are replete with references to the budget constraints felt by local education agencies when trying to meet the needs of handicapped children. *See, e.g.*, S. Rep. 168, 94th Cong., 1st Sess. 7, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1431. Congress did not expect that it would be able to entirely fund the handicapped programs. *See id.* at 16, *reprinted in* 1975 U.S. Code Cong. & Ad. News at 1440. It is illogical to assume that Congress would have burdened the states with a damages remedy when funding was not available to support the programs which were the purpose of the act. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24 (1981).

Moreover, as noted by the Seventh Circuit, educational placement of the handicapped is a still developing field. "[I]t would be incongruous for Congress to subject school systems to liability for damages each time a court disagreed with the school district's program while at the same time admitting the uncertainty of diagnosis in the field." *Anderson v. Thompson*, 658 F.2d at 1212.

Finally, the Supreme Court has stated that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at 17 (footnote omitted). Under the EHA, a guarantee of a free appropriate education for all handicapped children is clearly a condition on the receipt of funds. It is not unambiguous, however, that receipt was conditioned on the avail-

ability of a damage remedy to enforce that guarantee. According to *Pennhurst*, a requirement that a state assume such a potentially large liability must be more explicit.[5]

## THE REHABILITATION ACT

Plaintiff seeks damages in *Doe v. Maher* under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiff also seeks attorneys' fees in *Roe v. Riles* under section 505 of the Rehabilitation Act, 29 U.S.C. § 794a.[6] The availability of both of these remedies depends on the existence of a private right of action under § 504.

There can be no question that a private right of action lies under § 504, at least in this circuit. In order to decide if there is a private remedy, the court must apply the factors set out in *Cort v. Ash*, 422 U.S. 66, 78 (1975). The leading case analyzing those factors in terms of § 504 is *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977). The court in *Lloyd* found that a private right of action did exist. *Id.* at 1287. The reasoning in that case was adopted by the Ninth Circuit in *Kling v. County of Los Angeles*, 633 F.2d 876, 878 (1980). Defendants question the validity of the decisions in *Kling* and *Lloyd*, because they are written before *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). However, the holding in *Kling* was recently reaffirmed in *Fisher v. City of Tucson*, 663 F.2d 861, 864 (9th Cir. 1981).

Defendants also argue that the Supreme Court found no private right of action existed under § 504 in *Pennhurst*. Defendants misread the Court. In *Pennhurst*, the Court compared the language of the Developmental Disabilities and Bill of Rights Act, 42 U.S.C. § 6011, with the discussion of § 504 in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The Court

[5] Even though the EHA was passed pursuant to § 5 of the fourteenth amendment, this restriction on Congress' power applies. *See* discussion of abrogation, p. 15, *supra*.

[6] The prayer for attorneys' fees is premised on a cause of action based on § 504, 29 U.S.C. § 794.



used *Davis* to illustrate the distinction between Congress encouraging state programs and imposing obligations. *Pennhurst*, 451 U.S. at 27. The Court then went on to find that § 6011 imposed no obligations. *Id.* at 28 n.21. Defendants argue that this implies there were no obligations imposed on the states under § 504. This is incorrect. The issue in *Davis* was not encouragement versus no obligation, as in *Pennhurst*, but encouragement versus an affirmative obligation. The Court used *Davis* only to illustrate a type of distinction. It did not imply that there was no private remedy under § 504.[7]

Having found a private right of action under § 504, the next question is whether plaintiff is barred for failure to exhaust administrative remedies. The procedures under the EHA, 20 U.S.C. § 1415, are not administrative remedies for § 504. This is apparent from the regulatory structure under § 504. The regulations implementing § 504 require certain procedural safeguards, and allow compliance with the EHA as one means of fulfilling the requirement. *See, e.g.*, 45 C.F.R. § 84.36. Thus, the EHA procedures are a requirement under § 504, not a remedy which might need to be exhausted. The remedy is the procedures adopted from Title VI, 42 U.S.C. § 2000d, leading to a cut-off of federal funds. *See* 45 C.F.R. § 84.61.

Section 504 was intended to be interpreted in the same manner as Title VI, 42 U.S.C. § 2000d, and Title IX, 20 U.S.C. § 1681. *See* S. Rep. 1297, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390. As noted above, the implementing regulations supply the same procedural remedies as used for Title VI. A private litigant under Title VI or Title IX is not required to exhaust administrative remedies "[b]ecause the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time." *Cannon v. University of Chicago*, 441 U.S. 677, 707-08 n.41 (1979). For the same reason, exhaustion of administrative remedies should not be required under § 504. *Fells v.*

[7] It should be noted that the Court explicitly reserved the question of a private right of action under § 504 in *Southeastern Community College v. Davis*, 442 U.S. 397, 404-05 n.5 (1979).

*Brooks*, 522 F. Supp. 30, 33 (D.D.C. 1981); *Patton v. Dumpson*, 498 F. Supp. 933, 940-41 (S.D. N.Y. 1980).

The question now becomes one of appropriate relief. Plaintiff seeks damages under § 504 in *Doe v. Maher*. The courts that have addressed the issue of availability of a damage remedy have split. *See, e.g., Hutchings v. Erie City and County Library Board of Directors*, 516 F. Supp. 1265, 1269 (W.D. Pa. 1981) (damages available); *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104, 1112 (N.D. Cal. 1979) (no damages available). Section 504 is a civil rights statute, prohibiting discrimination in programs receiving federal funds. The legislative history sheds little light on the issue of appropriate relief, except to refer to Title VI and Title IX. However, analogy to those statutes is of no assistance since the cases are split. *See Miener v. Missouri*, No. 80-1971, slip op. at n.9 (8th Cir. Feb. 4, 1982).

The Supreme Court has indicated that a federal right to relief implies the availability of a remedy. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946). As discussed above, the only apparent remedy under § 504 is the cut-off of federal funds, a remedy which cannot aid the individual. Compensatory damages are a traditional remedy for the violation of civil rights. *Hutchings v. Erie City and County Library Board of Directors*, 516 F. Supp. at 1268. Therefore, this court finds a plaintiff may recover damages reasonably related to the conduct proscribed by § 504. *See Miener v. Missouri*, No. 80-1971 (8th Cir. Feb. 4, 1982) (damages available under § 504).

Plaintiff also seeks the remedy of attorneys' fees under § 504 in *Roe v. Riles*. Section 505(b) of the rehabilitation for the prevailing party in actions under § 504.[8] Defendants argue, however, that since plaintiff treated the case throughout essentially as one under the EHA, attorneys' fees should not be available under § 505. Defendants see this as an attempt to circumvent Congress' apparent decision to not provide fees under the EHA.

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[8] This provision for attorneys' fees is an additional indication of legislative intent to allow a private remedy under § 504, even though it was added later. *Garrity v. Gallen*, 522 F. Supp. 171, 211 (D.N.H. 1981).



This court finds this argument unpersuasive. At the time that Congress passed § 505, it was aware of the overlapping of the EHA and § 504. The EHA was passed in 1975, while § 505 was enacted in 1978. During the consideration of the EHA the committee reports referred on more than one occasion to § 504. *See* S. Rep. 168, 94th Cong., 1st Sess. 12, 28, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1480, 1507. Since Congress was aware of the overlap between the two statutes and did not exclude suits under both the EHA and § 504 from the coverage of § 505, it must be assumed that Congress foresaw the collection of fees under § 505 for cases which proceed primarily under the EHA. Therefore, an award of attorneys' fees pursuant to § 505 in *Roe v. Riles* is appropriate. *See Campbell v. Talladega County Board of Education*, 518 F. Supp. 47, 57 (N.D. Ala. 1981).

Finally, defendants argue that plaintiff has failed to state a claim under § 504 because he is not "otherwise qualified" within the meaning of the statute. In the alternative, defendants maintain they are covered by the "substantial justification" standard set out in *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977).

Defendants argue that plaintiff is not otherwise qualified because he is a danger to other students. Under the case law, a person is otherwise qualified if "the handicap is extraneous to the activity sought to be engaged in." *Anderson v. Banks*, 520 F. Supp. 472, 510 (S.D. Ga. 1981). For example, in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Court found that the ability to hear was a necessary part of being a nurse, so that a deaf woman was not otherwise qualified to attend nursing school. Similarly, in *Kampmeier v. Nyquist*, the court found that a school district could legitimately exclude a child with only one good eye from contact sports. The risk of injury to the remaining eye was inseparable from the activity sought.

The activity sought by plaintiff is a free appropriate education accompanied by the requisite procedural safeguards. Defendants seem to regard the activity sought as placement in Louise Lombard School. This is too narrow a reading of plaintiff's complaint in *Doe v. Maher*. The expulsion of a handicapped student cannot be the grounds for complete cessation of educational services. *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, ____

U.S. ____, 102 S.Ct. 566 (1981). An expulsion is also a "change in educational placement" which invokes the procedural safeguards of the EHA, particularly where the disruption which led to expulsion may have been caused by the student's handicap. *Id. Accord, Doe v. Koger*, 480 F. Supp. 225, 229 (N.D. Ind. 1979).

Plaintiff's behavioral pattern does not prevent him from benefitting from the activity sought, education, as in *Davis*. Nor does participation endanger the plaintiff, as in *Kampmeier*. Therefore, the handicap is extraneous to the activity sought, and plaintiff is an otherwise qualified individual.

This reading of "otherwise qualified" to include those who can benefit from the activity sought but who might be difficult to incorporate into the program is supported by the legislative history of § 504. The Senate report discusses with some concern the "exclusion from the service system of many of those individuals who were difficult to serve." S. Rep. 318, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2086. The Rehabilitation Act was enacted, in part, to prevent such discrimination.

Defendants argue that the school district was substantially justified in excluding plaintiff, therefore he was not otherwise qualified. *See Kampmeier v. Nyquist*, 553 F.2d at 299. If there is such an exception to § 504, the question remains whether the school needed to expel plaintiff in the manner it did. That is a factual issue, and as such is inappropriate to decide now.

## SECTION 1983

Plaintiff also seeks damages in *Doe v. Maher* under 42 U.S.C. § 1983, and attorneys' fees in *Roe v. Riles* under 42 U.S.C. § 1988 based on a § 1983 cause of action. The § 1983 claims are founded on the EHA, § 504 and the due process clause of the fourteenth amendment.[9]

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Supreme Court construed the phrase "and laws" in § 1983 to allow an action

[9] The due process claim is only in *Doe v. Maher*.



based on federal statutory claims as well as constitutional claims. The Court also found that such actions were not limited to statutes protecting equal rights. This apparently broad construction of § 1983 was narrowed in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). There the Court held that a § 1983 action lay only where the individual has a "right secured" by the statute. *Id.* at 28. The Court also stated that no § 1983 action would lie where the statute provided an "exclusive remedy." *Id.*

The exclusive remedy limitation was explored in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615 (1981). "When the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at ____, 101 S.Ct. at 2626.

Applying these standards to the EHA, this court finds that an action does lie under § 1983.[10] Plaintiff clearly has a right secured by the EHA. The Senate Report on the EHA states that "[i]t is the intent of the Committee to establish and protect the right to education for all handicapped children." S. Rep. 168, 94th Cong., 1st Sess. 13, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1437. *See also* S. Conf. Rep. 455, 94th Cong., 1st Sess. 29, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1480, 1482 (purpose of the EHA to assure equal protection of the laws). It is also clear that the EHA is not an exclusive remedy for protecting the interests of handicapped children. There is an elaborate mechanism for protecting these rights under the EHA, including a statutorily created private right of action under § 1415. However, the EHA has not totally occupied the field of handicapped civil rights. As discussed above, *supra* p. 7, Congress was aware that § 504 was also applicable to many of the same issues. Congress also expected individuals to be able to seek redress in the courts under other laws. S. Rep. 168, 94th Cong., 1st Sess. 26,

[10] *Contra, Anderson v. Thompson*, 658 F.2d at 1217.

*reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1450.[11] Therefore, the EHA is not an exclusive remedy.[12]

Section 504 also can provide a basis for an action under § 1983, for the same reasons. Section 504 secures a right, since it is a typical civil rights statute. It is not an exclusive remedy, both because of the simultaneous coverage of the EHA and the inadequacy of administrative remedies under § 504.

Defendants have argued that to allow a § 1983 claim under the EHA would permit inconsistent remedies because the EHA does not allow for damages. *See Anderson v. Thompson*, 658 F.2d at 1216. However, this court is of the opinion that the appropriate time for such considerations is not in determining whether a § 1983 action is available, but in determining what remedy would be suitable once a violation is found.

Plaintiff also seeks damages in *Doe v. Maher* under § 1983 pursuant to the fourteenth amendment for deprivation of due process. There can be no question that a § 1983 action lies under the fourteenth amendment. There is also no question but that a claim of denial of due process before suspension or expulsion states a claim for relief. *See Carey v. Piphus*, 435 U.S. 247 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975); *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634 (S.D. Tex. 1978).

Defendants argue here, as under § 505, that attorneys' fees should not be available under § 1988 in *Roe v. Riles* because the case was pursued only under the EHA. However, since an action under § 1983 is available to enforce the EHA, this court does not find it inconsistent to use § 1988 as a vehicle for awarding attorneys' fees.

[11] This also indicates that Congress expected individuals might have a remedy under civil rights acts such as § 1983.

[12] *But cf. Anderson v. Thompson*, 658 F.2d at 1215 (complete relief available under the EHA, as distinguished from the Social Security Act, analyzed in *Maine v. Thiboutot*, 448 U.S. 1 (1980), because the EHA provided a right of action.



## ATTORNEYS' FEES

Having found attorneys' fees available in *Roe v. Riles*, two issues remain. First, defendants contend that plaintiff was not the prevailing party. "[P]laintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978), *quoted in Sethy v. Alameda County Water District*, 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980). Although plaintiff may not have gotten precisely what he sought in *Roe v. Riles*, he did prevail since this court's finding was not an affirmance of the placement decided on in the state hearing process. The fact that the court-ordered placement was not "substantially different" from that proposed by defendants at the end of the trial, Memorandum Opinion of Sept. 30, 1981, at p.7, does not affect this determination. The Supreme Court has found that a party can "prevail" through settlement. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). If so, then surely a plaintiff can prevail after a full scale trial even if the court's decision agrees with defendants' last proposal.

Second, defendants argue that plaintiff should not recover attorneys' fees for work done in administrative hearings. In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Supreme Court held that attorneys' fees were available for administrative hearings in a Title VII suit, pursuant to 42 U.S.C. § 2000e-5(k). The Court construed the statutory language of "any action or proceeding" to include hearings "other than court actions." 447 U.S. at 61. Section 1988 similarly allows attorneys' fees in "any action or proceeding to enforce a provision of [section] . . . 1983."

The administrative hearings to provide plaintiff with an Individualized Education Program were clearly proceedings to enforce the EHA guarantee of a free appropriate education. They are analogous to the comprehensive enforcement scheme of Title VII considered in *New York Gaslight Club. Department of Education v. Valenzuela*, 524 F. Supp. 261, 264 (D. Hawaii 1981). Fees are not available for administrative hearings for enforcement of § 504, however, via either § 505 or § 1988. The

administrative hearings are not to enforce § 504 because they are requirements, not remedies. *See supra,* p. 5.

## THE ELEVENTH AMENDMENT

The final issue to be addressed is whether damages or an award of attorneys' fees against defendants is barred by the eleventh amendment to the United States Constitution. The eleventh amendment bars suits against states, or those entities which are arms of the state. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 280 (1977). The states' immunity can be abrogated, however, by congressional enactments pursuant to § 5 of the fourteenth amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976). Two questions therefore arise: which defendants partake of the state's eleventh amendment immunity, and whether any of the statutes involved here abrogate the state's immunity pursuant to § 5 of the fourteenth amendment.

Plaintiff has sued the California State Department of Education and the San Francisco Unified School District.[13] Plaintiff does not contend that the department of education is not an arm of the state for eleventh amendment purposes. *See also* Cal. Educ. Code § 33300. Plaintiff does argue, however, that the school district is not covered by the eleventh amendment.

The Supreme Court addressed the immunity of school districts in *Mt. Healthy* and set out several factors which it considered in determining that Ohio school districts were not arms of the state. 429 U.S. at 280. The Ninth Circuit recently held that California school districts similarly had no eleventh amendment immunity. *Padway v. Palches,* 665 F.2d 965, 969 (1982). The *Padway* court did not address the *Mt. Healthy* factors, but it did clearly approve

[13] Plaintiff has also named the state superintendent of schools and various officials of the school district. Insofar as they are sued in their official capacity, such persons are cloaked with the immunity of the entity they serve. Insofar as they are sued individually, they have no eleventh amendment immunity. *See Scheuer v. Rhodes,* 416 U.S. 232, 237-38 (1974). Therefore, they will not be discussed separately from the political organizations.



of the district court's reasoning. *Padway v. Palches,* 665 F.2d at 969. In the district court opinion, Judge Renfrew engaged in an extensive analysis of the position of California school districts:

> The autonomous nature of California school districts and the schools boards [sic] which serve as their administrative arms is evident from a reading of the relevant statutory provisions. Although the state does aid the various districts, it is the explicit intent of the legislature that "[t]he system of public school support should be designed to strengthen and encourage local responsibility for control of public education." Cal. Ed. Code § 14000. To effectuate this intent, every school district is placed under the control of a locally elected board of trustees or board of education. Cal. Ed. Code §§ 35010 and 35011. To support these local school entities, each city or county board of supervisors is empowered to collect "a district tax for each school district * * * whose budget shows a district tax to be necessary." Cal. Ed. Code § 14204. The governing board of each district is also authorized to order the county superintendent of schools to call an election on whether bonds of the district shall issue, Cal. Ed. Code § 15100. Following the approval by the voters, the city or county supervisors are to sell such bonds as the governing board of the school district shall direct by resolution. Cal. Ed. Code § 15140.
>
> As further evidence of their independence from state control, "the governing board [of the school district] may sue and be sued, and hold and convery [sic] property for the use and benefit of the school district." Cal. Ed. Code § 35162. *See Hutchinson v. Lake Oswego School District No. 7, supra,* 519 F.2d at 966-977. *Cf. Moor v. County of Alameda,* 411 U.S. 693, 717-721 (1973) (rejecting the contention that California counties are arms of the state, holding instead that they are "citizens" for diversity purposes, and also questioning the correctness of earlier authority holding a California school district to be a part of the government of the state and, therefore, not a "person" for diversity purposes).
>
> *Padway v. Palches,* No. 78-0427, slip. op. at 22 n.22 (N.D. Cal. Feb. 28, 1980). This court is bound by the holding of the Ninth Circuit, and persuaded by the reasoning of Judge Renfrew. The school district has no eleventh amendment immunity.

The issue remains of whether the department of education is protected by its eleventh amendment immunity. It is clear that § 1983 does not abrogate the state's immunity. *See Quern v. Jordan,* 440 U.S. 332 (1979). Plaintiff, however, argues that the EHA, § 1988, § 504, and § 505 sweep away the state's immunity. Plaintiff seeks damages and attorneys' fees from the state under these provisions.

Generally, abrogation requires not only that the statute have been passed pursuant to § 5 of the fourteenth amendment, but also that an express legislative intent or persuasive legislative history appear. *See Quern v. Jordan,* 440 U.S. at 345. The legislative history and language of EHA indicate an intent to make the states responsible parties in the provision of education for handicapped children. There can be little doubt that Congress enacted EHA pursuant to its power under § 5 of the fourteenth amendment and fully intended to abrogate the states' immunity. "It is this Committee's [Senate Committee on Labor and Public Welfare] belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. Rep. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1433. Congress in authorizing enforcement of EHA against the states did not expressly provide for damages or attorneys' fees. In order to sweep away the states' immunity from liability for charges upon its funds the language must be explicit. As discussed above, the language that has supported such abrogation is not present in the legislative history of the EHA. *See generally Fitzpatrick v. Bitzer, supra.* The "appropriate legislation" in this case does not provide for damages or attorneys' fees.

However, the EHA can be the underlying statute for an award of fees pursuant to § 1988. The Supreme Court has found that § 1988 abrogates a state's immunity. *Hutto v. Finney,* 437 U.S. 678, 693 (1978). Section 1988 applies to § 1983 actions grounded on statutory as well as constitutional claims. *Maine v. Thiboutot,* 448 U.S. 1, 9 (1980). Although there is some question whether § 1988 eliminates a state's eleventh amendment protection "in a case involving a purely statutory, non-civil rights claim," *Maher v.*



*Gagne,* 448 U.S. 122, 130 (1980), that is not the case here. The EHA is a civil rights act, in the sense that it was created to secure the equal protection of the laws. *See supra,* p. 10. Taking all of these factors into consideration, there is no difficulty in finding a congressional intent to do so under § 1988.

Plaintiff also seeks damages from the state under § 504. Unlike § 1988, there is no evidence in the legislative history of an intent to eliminate eleventh amendment immunity from damages.

There is ample evidence, however, of an intent to abrogate immunity from fees under § 505:

> The authorization of attorneys' fees under proposed section 505(b) in cases brought to enforce title V is within the power of Congress under among other things, section 5 of the 14th amendment. . . . [T]he 11th amendment should not be a bar to the recovery of attorneys' fees under proposed section 505(b) from State and local governments.

124 Cong. R. S19000 (daily ed. Oct. 14, 1978) (statement of Sen. Stafford during debate on the conference report).

In sum, the eleventh amendment does not bar any recovery against the school district. It does bar all recovery against the state education department except attorneys' fees in *Roe v. Riles* and whatever limited recovery to which a plaintiff may be entitled under the EHA.

## CONCLUSION

This court finds that there is no action for damages pursuant to the EHA. There is a private remedy under § 504 for compensatory damages insofar as violation of § 504 resulted in an exacerbation of the handicapping condition. The private right of action under § 504 also allows recovery of attorneys' fees under § 505. There is also a § 1983 action under both the EHA and § 504. Whether damages are available pursuant to a § 1983 action based on those statutes is an issue this court reserves. Damages are, of course, available in a § 1983 suit pursuant to the due process clause of the fourteenth amendment. Attorneys' fees are available under § 1988 on all § 1983 claims, including fees for administrative hearings on the § 1983 claim which is pursuant to the EHA. There is no eleventh amendment immunity for the school district. There is complete immunity from damages for the State Department of Education, but not for fees awarded under § 1988 or § 505.

Dated:

MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge



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In the United States District Court
for the Northern District of California

Civil No. C-80-4270 MHP

John Doe, Plaintiff,
Jack Smith, Plaintiff-Intervenor,

vs.

Bill Maher, et al., Defendants.

## Stipulation of Facts

[Filed April 1, 1983]

Plaintiffs and defendants Maher, Anaya, Anderson, Hopp, Kopf, Mezey, Tom, and their successors in offices; Alioto, Figone, Caruso, and Barrett, in the interest of narrowing the issues for all proceedings in the above-entitled actions, hereby agree and stipulate to the following facts as follows:

1. Plaintiff John Doe is a resident of San Francisco, California, and a student in the San Francisco Unified School District (SFUSD).

2. Plaintiff Doe is declared eligible for special education services by SFUSD as a multi-handicapped child with a neurological deficit and significant emotional problems in his Individualized Education Program.

3. Plaintiff Doe is an educationally handicapped child eligible for special education and related services pursuant to the Education for All Handicapped Children Act of 1975, as amended, and regulations promulgated thereunder, and California Education Code sections 56000 et seq.

4. Plaintiff Doe is a handicapped individual within the meaning of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794.

5. On March 17, 1980, an assessment plan for plaintiff Doe, prepared by SFUSD, called for review of material from Napa State Hospital in preparation for the IEP.

6. At the time of his suspension, plaintiff Doe's IEP of April 9, 1980, and the Napa State Hospital report of February 1980, were a part of plaintiff Doe's SFUSD file.

7. During the fall of 1980, plaintiff Doe attended classes at Louise Lombard School in the SFUSD in conformance with his IEP.

8. As the result of an incident with another student at Louise Lombard School, plaintiff Doe was suspended from school for five days on November 6, 1980.

9. On November 14, 1980, defendant Henry Caruso issued a document called "Student Placement Referral" concerning plaintiff Doe.

10. The "Student Placement Referral" of November 14, 1980, indicates that plaintiff Doe is multi-handicapped.

11. The "Student Placement Referral" of November 14, 1980, indicates a request for review by the Student Placement Committee for expulsion or exclusion of plaintiff Doe.

12. On the "Student Placement Referral" of November 14, 1980, under the first section, "Request for Review," no marks are indicated on any review options other than "expulsion" and "exclusion".

13. The incident that provided the basis for the completion of the Student Placement Referral by Henry Caruso concerning plaintiff Doe was the incident of November 6, 1980.



14. As indicated by letter to plaintiff Doe's mother from the SFUSD on November 14, 1980, the Student Placement Committee decided to recommend the exclusion/expulsion of plaintiff Doe in compliance with California Education Code section 48900 et seq. and the San Francisco Board of Education policy #5114 on Student Discipline.

15. The San Francisco Board of Education policy #5114 on Student Discipline delineated disciplinary procedures for all pupils in the SFUSD.

16. Defendants applied San Francisco Board of Education policy #5114 in all disciplinary cases involving students eligible for or enrolled in special education until November 25, 1981.

17. At all times relevant, San Francisco Board of Education policy #5114 on Student Discipline did not describe any procedure specifically tailored to address the situation of a special education student against whom disciplinary action was contemplated.

18. On November 14, 1980, plaintiff Doe, by letter of his counsel to James Cassassa, Compliance Office of SFUSD, requested initiation of the special education administrative process, i.e., convening of an IEP meeting to discuss and formulate a change of placement, in lieu of referral to the Student Placement Committee (SPC). Copies of this letter were provided to defendants Alioto, Figone and Caruso.

19. On November 15, 1980, plaintiff Doe and his mother received a letter from the SPC that a hearing of the Administrative Hearing Panel held by defendant Figone, Chairman of the Student Placement Committee (SPC) would be held on November 25, 1980, to consider the SPC's recommendation for expulsion or exclusion of plaintiff Doe.

20. In the November 14, 1980, meeting with plaintiff, his mother, his counsel, his teacher and a Legal Services for Children caseworker, Mr. Caruso acknowledged that he was aware that the plaintiff could not be excluded until another program was designed for him and that plaintiff must be allowed to return to

school pending the outcome of proceedings concerning the decision to change John's placement.

21. As a result of initiation of legal action by plaintiff Doe, on November 24, 1980, United States District Judge Marilyn Patel directed defendants to provide home teaching for plaintiff Doe until an IEP meeting could be convened to review his program and placement.

22. From November 6 to November 26, 1980, defendant SFUSD did not allow plaintiff Doe to attend his classes at Louise Lombard School, nor did defendants provide plaintiff Doe any alternative educational placement.

23. The SFUSD Board of Education is responsible for establishing policies and procedures for the operation of the SFUSD.

24. The SFUSD Board of Education is responsible for establishing policies and procedures concerning the provision of publicly-funded special education programs for students in the SFUSD.

25. The SFUSD receives funds from the State Department of Education pursuant to the Education for All Handicapped Children Act of 1975 (EHA), as amended, 20 U.S.C. section 1401.

26. As a recipient of federal funds for the education of handicapped children, the SFUSD has assured the State Department of Education that the district will comply with all of the requirements of the EHA and of the Rehabilitation Act of 1973, 29 U.S.C. section 794.

27. From September 20, 1978, to November 25, 1981, SFUSD Board of Education policy #5114 represented the only SFUSD policy concerning disciplinary procedures for students.

28. The SFUSD Board of Education appointed Robert F. Alioto superintendent of the SFUSD.

29. Superintendent Alioto is responsible for carrying out the policies and procedures of the SFUSD Board of Education, state, and federal law.

30. Superintendent Alioto is responsible for insuring that all handicapped students in the SFUSD are educated in compliance



with 20 U.S.C. section 1401 et seq., California Education Code sections 56000 et seq., and 29 U.S.C. section 794.

31. Robert Figone, as chairperson of the Student Placement Committee (SPC) of the SFUSD, is responsible for recommending expulsion, exclusion or other measures as a solution to problem students referred to the SPC.

32. As designated by Superintendent Alioto, Robert Figone is responsible for administering the California Education Code and SFUSD disciplinary procedures in his position as chairperson of the SPC.

33. On November 14, 1980, Henry A. Caruso wrote a memorandum to Robert Figone which states that plaintiff Doe is in the multi-handicapped program.

34. Henry Caruso, as principal of Louise Lombard School in the SFUSD, is responsible for the operation and administration of that school in compliance with SFUSD Board of Education policies and state and federal laws.

35. Henry Caruso is responsible for supervision of Severely Handicapped Programs at Louise Lombard School.

36. Henry Caruso is responsible for supervision of the educational programs of multi-handicapped students at Louise Lombard School.

37. Plaintiff Jack Smith is a resident of San Francisco and a student in the San Francisco Unified School District.

38. Plaintiff Smith is an educationally handicapped child eligible for special education and related services pursuant to the EHA and regulations promulgated thereunder and California Education Code sections 56000 et seq.

39. Jack was identified as educationally handicapped by the SFUSD by the time he was in the second grade in 1976. It was noted in the Admission Committee Action Report concerning Jack, dated March 17, 1976, that Jack had behavior disorders in that he had an "inability to control verbal or physical outburst" and "serious emotional disturbance".

40. In a subsequent Admission Committee Action report dated June 19, 1976, Jack was again identified as educationally handicapped. Once again, the SFUSD recognized Jack as having a behavior disorder identified as "inability to control verbal or physical outburst." This report also notes that Jack had a "serious emotional disturbance," specific learning disabilities, and "severe disturbance in relationships with peers and adults."

41. Jack attended Edgewood Learning Center, a private school for emotionally disturbed children, from December 1976 until fall of 1979. An extensive evaluation of Jack prepared by Edgewood personnel prior to his entry into the program describes Jack as follows: "When threatened and under stress, [Jack] attempts to cover his feelings of low self-worth through aggressive behavior. These actions are primarily verbal provocations." The evaluator reported: "He [Jack] once threatened me with his fist, but my clear supportive "no" response to his threat quickly diminished that action. . . . [Jack] will continue to have learning problems because of his emotional insecurity, which is handled by him primarily, at present, through verbal provoking."

42. In an IEP for Jack by the SFUSD dated April 5, 1978, Jack's handicap was diagnosed as "low academic achievement due to behavioral disorders and extreme hyper-reactivity." His social adaptation skills were found to be "inappropriate for age," with "poor peer relationships." A supportive, structured classroom was recommended for Jack, based upon the finding that he "requires constant monitoring and supervision in as close to a stimulus-free environment as possible."

43. Jack's IEP by the SFUSD dated January 12, 1979, describes Jack as hyperactive and distractable, with poor peer relationships. This IEP specified that Jack needed a structured learning environment providing "one-to-one attention" and "constant monitoring." Hyperactivity and poor peer relationships were again noted.

44. In September 1979, Jack began classes at A. P. Giannini Middle School, a SFUSD public school.

45. On February 4, 1980, an IEP meeting was held at A. P. Giannini School for Jack. He was again identified as a learning-



disabled student, and the recommended program was a "Learning Disability Group in the regular school setting (A. P. Giannini) with three periods of Learning Disability Group, lunch, and science (regular program) on a trial basis. Need for daily instruction in Reading, Spelling, Math." Under the Behavior/Social Adaptation section of Current Levels of Educational Performance, the IEP notes that Jack "wants to succeed, will take responsibility for completing tasks (homework); can be very courteous, warm and friendly; seeks attention from adults and peers much of the time; highly distractable, impulsively takes things; high anxiety, low self-esteem." The IEP recommends a "highly structured environment," with "well-defined limits" and "close supervision in small pupil-teacher ratio setting."

46. In September 1980, at the beginning of the current school year, Jack was assigned to a full-day program at A. P. Giannini with learning-disabled group special education classes.

47. On October 14, 1980, for behavioral problems during the school day, Jack's program was reduced to a half-day by the administration of A. P. Giannini, after conference with his grandparents, Mr. and Mrs. Jack Smith. He was dismissed from school each day at 12:30 p.m., before lunch.

48. From October 14 to November 14, 1980, SFUSD provided plaintiff Smith with a school program on a half-day basis.

49. On November 4, 1980, a conference was held at A. P. Giannini with Jack's grandparents. Despite the recognition and consensus of school administrative opinion that "[Jack] acts impulsively [and] he really doesn't plan to do the things he does," school personnel informed Jack and his grandparents that any further disturbances on his part would result in his suspension from school and referral to the Student Placement Committee for placement in another educational setting. The school offered that each two weeks of "successful" conduct would lead to the addition of one school period for Jack. The directions of the conference were confirmed in a letter sent by the assistant principal to Jack's grandparents.

50. On November 14, 1980, Jack was suspended from A. P. Giannini School for five days pursuant to California Education Code section 48900(h) for "disrupting school activities."

51. On November 17, 1980, the principal of A. P Giannini, Marybeth Barrett, referred Jack to the Student Placement Committee of the SFUSD. The referral noted that "[Jack's] actions seem beyond his control. He always admits what he does and is sorry afterward. He cannot deal with his peers although academically is fine." The referral noted that plaintiff was currently in a special education program.

52. The referral of November 17, 1980, by Marybeth Barrett was based on an anecdotal record since the start of the school year.

53. The Admission Committee Action reports of March 17, 1976, and June 9, 1976, the IEPs of April 5, 1978, January 12, 1979, and February 4, 1980, and psychological reports of September 21 and October 12, 1979, concerning plaintiff Smith were a part of plaintiff Smith's school file on November 14, 1980, and as such were available to all SFUSD personnel.

54. On November 21, 1980, the Student Placement Committee issued a letter to plaintiff Smith's grandparents notifying them that the SFUSD SPC had recommended that plaintiff Smith be excluded from the SFUSD pursuant to disciplinary provisions of California Education Code section 48900 et seq. and SFUSD Board policy #5114. The letter also notified the grandparents that a hearing held by Robert Figone, chairman of the SPC, would be held on December 2, 1980, to review plaintiff Smith's exclusion from the SFUSD, and, pending such review, plaintiff Smith would continue to be on suspension pending final action in the matter.

55. On November 28, 1980, counsel for plaintiff Smith wrote a letter to defendant Figone protesting the referral of plaintiff Smith to the SPC and plaintiff's indefinite suspension. Additionally, the letter noted that such action violates special education administrative procedures concerning changes of placement which would entail convening of an IEP meeting prior to any change in placement or program.



56. On December 1, 1980, defendant Figone cancelled the hearing scheduled for December 2, 1980, concerning the exclusion of plaintiff Smith.

57. On December 1, 1980, defendant Figone informed plaintiff Smith and his grandparents that plaintiff could either attend a half-day program at A. P. Giannini or receive home teaching. On December 3, 1980, plaintiff and his grandparents informed defendant Figone that they felt home teaching would be more appropriate than a half-day program.

58. After November 14, 1980, the SFUSD did not allow plaintiff Smith to return to his educational placement at A. P. Giannini School.

59. On December 8, 1980, plaintiff's counsel repeated the request for home teaching and initiation of correct special education.

60. From November 14 to December 10, 1980, plaintiff Smith was not provided an alternative educational program.

61. Commencing December 10, 1980, plaintiff Smith received home instruction one hour each day.

62. Subsequent to suspension of plaintiff Smith on November 14, 1980, the next IEP meeting concerning his program and placement was held January 6, 1981.

63. On or about October 14, 1980, plaintiff Smith's educational program was changed to a half-day program.

64. There was no IEP meeting held to recommend or review the change to a half-day program effected on or about October 14, 1980.

65. Marybeth Barrett is the principal of A. P. Giannini School in the San Francisco Unified School District.

66. Marybeth Barrett is responsible for the operation and administration of A. P. Giannini School in compliance with SFUSD Board of Education policies and state and federal laws.

67. Defendant Barrett is responsible for supervision of the educational program of educationally handicapped students at A. P. Giannini School.

68. SFUSD did not provide notice of an opportunity to be heard to either plaintiff Doe or Smith prior to extending their suspensions pending expulsion/exclusion proceedings.

Respectfully submitted,

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United States District Court
For the Northern District of California

Civil No. C-80-4270 MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor,

v.

William Maher, et al.,
Defendants.

Defendant San Francisco Unified School District's Opposition to Plaintiff's Motion for Partial Summary Judgment

**Dkt. #208**
**(Exhibits only)**

## DECLARATION

I HENRY A. CARUSO, do hereby declare:

As of November, 1980, I was the Principal of Louise Lombard School. On November 6, 1980 an incident occurred involving the person identified in United States District Court, Civil No. C-80-4270 MHP, as John Doe. The incident in question involved two events, the first of which was that John Doe strangled a fellow student at Louise Lombard School so severely as to cause abrasions to the child's neck and secondly, while being escorted to the Principal's Office for discipline, kicked out a window at the school. The strangling of a child was the second such incident involving John Doe. Contrary to the allegation set forth by the plaintiffs in their factual summary accompanying their motion for partial summary judgment, John Doe was under supervision at the time that both of the strangling incidents occurred.

As a result of the above incident I felt that it was necessary to have John Doe removed from Louise Lombard School. It was my determination that a five-day suspension was necessary for disciplinary purposes. At the time of the suspension I informed John Doe of his rights as required by the Education Code, including informing him of the acts with which he had been charged, his opportunity to have an additional hearing where he could present evidence and witnesses on his behalf and cross-examine witnesses against him, and I also gave him an opportunity to admit or deny the actions specified above. John Doe admitted that he had committed the acts of which he was accused. He also admitted strangling a child on a previous occasion.

After effecting John Doe's suspension I informed him that if he requested it, he would be entitled to have homework assignments. John did request that he be given homework assignments and these were given to him.

John Doe was to return to Louise Lombard School on November 14, 1980 for a conference with his mother and myself. John Doe's mother was informed of the meeting by a letter from myself. At the November 14, 1980 meeting, John Doe's mother, Mrs. [redacted] and the attorney who represented John were informed that John was being suspended and the reasons therefor



and that he was being referred to the Student Placement Committee, Pupil Services, for consideration of a possible transfer to another program because he was a danger to the other students at Louise Lombard School.

On November 14, 1980, based upon my review of Exhibit 4 included with the plaintiffs' Motion for Partial Summary Judgment, on information and belief, Mrs. [redacted] was informed that a meeting would be held on November 25, 1980 at the Student Placement Committee offices. The purpose of the meeting was to discuss the proposed explusion of John Doe. Mrs. [redacted] was informed by the Student Placement Committee that, pending the meeting of November 25, 1980, her son would continue to be on suspension from school pursuant to California Education Code Section 48903(h).

It has come to my attention that the plaintiffs in this lawsuit have alleged that the Louise Lombard School was not appropriate to John Doe's needs. While Louise Lombard School was not the ideal setting for John, it was the most restrictive placement that the District had available to it at that time. Previous to his placement at Louise Lombard School the District had attempted to place John Doe at other locations, but these were not successful. At Louise Lombard School the classes are much smaller than at regular public schools and the students are in a very protective highly supervised environment. John Doe received much personal attention from the teachers and other staff at the school, far in excess of that attention given to most of the other students who were attending the school.

Under penalty of perjury I declare the above to be true and correct and of my own personal knowledge, except as to those matters which are based on information and belief, and as to those matters I believe them to be true. If called upon to do so, I could and would testify to these matters in open court.

So sworn this 29th day of April, 1983.

HENRY A CARUSO

## DECLARATION

I, JOSEPH ROSENBLATT, do hereby declare:

As of November, 1980, I was the Dean of Boys at Giannini Junior High School. At that time a student known in the United States District Court lawsuit, Civil No. C-80-4270 MHP, as Jack Smith attended Giannini Junior High School.

During the time that Jack Smith was a student at Giannini I was, on numerous occasions, in contact with him and his grandparents for disciplinary problems. Among Jack Smith's actions that required discipline were the stealing of purses and school property, extortion of other students, the making of sexual remarks to girls, and the touching or grabbing of girls. On a number of occasions, because of these actions, Jack Smith and his grandparents were called to the school for conferences. Jack always admitted doing the acts of which he was accused and his grandparents were always informed of the school's reaction to these actions. His grandparents defended Jack every step of the way and every recommendation made by school staff was rejected by the grandparents. It should be pointed out that the reason that Jack Smith ended up at Giannini was at the insistence of his grandparents who had removed him from the Edgewood School (against Edgewood's advice) which is a home for disturbed children. The grandparents in my opinion were not looking out for the best interests of Jack Smith and certainly did not heed any of the advice given to them by me or other staff at Giannini.

Prior to Jack Smith's suspension his grandparents were informed that should the above-mentioned incidents continue he would be suspended and recommended for removal from Giannini.

On November 14, 1980, Jack Smith was suspended from Giannini for disrupting school activities, making sexual remarks to girls and making sexual gestures. As indicated from the above, this was just a continuation in a long series of incidents involving Jack was having. I contacted the grandparents on the date of Jack's suspension and informed them of the charges against Jack and that he had admitted doing the acts of which he was accused.



Based upon information and belief, as indicated on Exhibit 8 of the plaintiffs' Motion for Partial Summary Judgment, Jack Smith was afforded his due process prior to the suspension. He was informed of his rights, the charges against him, and given an opportunity to respond to the charges. Jack admitted doing the acts of which he was accused.

On November 17, 1980, based upon information and belief and my review of Exhibit 9 of the plaintiffs' Motion for Partial Summary Judgment, Jack Smith was referred to the Student Placement Committee for referral to the Emergency Evaluation Center.

Contrary to what the plaintiffs allege in their Motion for Partial Summary Judgment, Jack Smith's grandparents were *not* totally opposed to his removal from Giannini or the placing of Jack on a part-day program. At the final meeting with Jack's grandparents they agreed that his removal from Giannini and placement on a part-day program were appropriate. The preceding is based upon my review of the notes contained on Exhibit 9 in the plaintiffs' Motion for Partial Summary Judgment.

Under penalty of perjury I declare the above to be true and correct and of my own personal knowledge, except as to those items based upon information and belief and as to them I believe them to be true. If called upon to do so I could and would testify as to these matters in open court.

So sworn, this 29th day of April, 1983.

Joseph Rosenblatt

JOSEPH ROSENBLATT

5902C

## DECLARATION

I, MARYBETH BARRETT, do hereby declare:

As of November, 1980 I was the Principal at Giannini Middle School. At that time the person known in United States District Court lawsuit, Civil No. C-80-4270 MHP, as Jack Smith was a student at Giannini.

The practice at Giannini at that time for the suspension of a student was that at the time of the suspension the student would be informed of his due process rights prior to being suspended unless it was an emergency situation. If the student was granted his due process rights an indication would be made on the Notice of Suspension.

I reviewed Exhibit 8 of the plaintiffs' Motion for Partial Summary Judgment and have noted that Jack Smith was given his due process rights prior to suspension. Based upon this indication it is my belief that the plaintiff was afforded his due process rights prior to being suspended consistent with the usual practice at Giannini.

Prior to the incident of November 14, 1980 and while I was at Giannini Junior High School, Jack Smith was involved in a number of disciplinary actions at the school He had a history of stealing, extortion, and making sexual gestures and remarks to girls at the school. He was a discipline problem at the school and the incident of November 14, 1980 was the last straw. Prior to that incident he had been informed that should the incidents continue he would be suspended.

Under penalty of perjury I declare the above to be true and correct and of my own personal knowledge, except as to those matters alleged on information and belief, and as to those matters I believe them to be true. If called upon to do so I could and would testify as to these matters in open court.

So sworn this 29th day of April, 1983.

Marybeth Barrett
MARYBETH BARRETT



## DECLARATION

I, ROBERT FIGONE, do hereby declare:

As of November 1980, I was the Chairman of the Student Placement Committee (SPC) for the San Francisco Unified School District. After receiving the requests for review from Henry Caruso and Marybeth Barrett for possible recommendation of expulsion or referral to the Emergency Evaluation Center of plaintiffs John Doe and Jack Smith, respectively, it would have been SPC's procedure to conduct a full hearing concerning the recommendations consistent with the guidelines set forth in the plaintiff's exhibits 4 and 10. After this meeting, if expulsion or exclusion had been recommended, the matter would have been referred to the Board of Education ("BOARD") for another hearing wherein the students would have had an opportunity to have a complete hearing, including a right to representation by legal counsel and the opportunity to present and challenge evidence. The Board would then make a final decision as to whether or not expulsion or exclusion was proper.

I declare the above to be true and correct, of my own personal knowledge and if called upon to do so could and would testify as to these matters in open court.

So sworn under penalty of perjury this 2nd day of May, 1983.

ROBERT FIGONE
Robert Figone

## DECLARATION

I, PEGGY GORDON, do hereby declare:

At the present time I am the Compliance Officer for the San Francisco Unified School District. Within the scope of my job I am required to review and mediate complaints filed by parents of educationally handicapped students for possible deviations from the student's individualized programs (IEP). I am required to review the student's IEPs and make a decision based upon the IEP and the student's records concerning whether or not the school in question has provided the student with the appropriate education as is required by the IEP.

I have reviewed the IEP of the person known as Jack Smith in so far as an allegation has been made that the reduction in October, 1980 to a part day program constituted an unauthorized change in his educational program. Prior to beginning the Fall, 1980 Semester, Jack Smith was on a part day program consistent with the provisions of his IEP. At the beginning of the Fall Semester he was put on a full day program on a trial basis in order to see whether he would succeed with this class load. In October it was determined that he could not handle such an extensive load and his class load was accordingly reduced within the limits prescribed by the IEP.

The IEP for Jack Smith contemplated a flexible program consistent with the capabilities of Jack to handle an increased school load. In my opinion, the IEP allowed the school personnel to increase or decrease Jack's program within the parameters of a part day program up to a full day program. The change made in October, 1980 was consistent with the IEP.

Under penalty of perjury, I declare the above to be true and correct, of my own personal knowledge, and if called upon to do so could and would testify to these matters in open court.

So sworn this 2nd day of May, 1983.

Peggy Gordon
PEGGY GORDON



United States District Court
Northern District of California

No. C-80-4270-MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor,

vs.

Willian Maher, et al.,
Defendants.

John Roe,
Plaintiff,

vs.

Wilson Riles, et al.,
Defendants.

C-81-1602-MHP
Errata to Opinion
[Filed May 25, 1982]

Page one of the order filed herein on May 25, 1982 is amended in the following respect:

to delete word "OPINION" and add the words "MEMORANDUM DECISION."

IT IS SO ORDERED.

Dated: June 6, 1983.

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

United States District Court
Northern District of California

No. C-80-4270-MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor,

vs.

William Maher, et al.,
Defendants.

Order
[Filed June 17, 1983]

Plaintiffs John Doe and Jack Smith brought this action against the State of California, the San Francisco Unified School District (SFUSD) and various District officials, alleging violations of the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401-1461, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 42 U.S.C. § 1983, and the Fourteenth Amendment. This case has had a long and tortured history. It now comes before the court on plaintiffs' motions for partial summary judgment against SFUSD and the individual defendants and defendants' motions for reconsideration of the court's previous order. Having heard and considered the arguments of counsel, the court hereby grants plaintiffs' motions in part and denies them in part, and grants and denies defendants' motions in part. The court issues the following order to clarify the basis for its rulings and to set forth the issues which remain for trial.

I. *FACTS*

The facts that follow are undisputed. Plaintiff John Doe is an emotionally handicapped student with a tendency to become aggressive in certain circumstances. Pursuant to an April 1980 Individualized Education Program (IEP) team's recommendation, the SFUSD placed Doe in the Louise Lombard School. On November 6, 1980, he assaulted another student and broke a school window, and when interviewed by the school principal,



Henry Caruso, admitted his misconduct. It is undisputed that this conduct arose out of Doe's handicap.

Caruso suspended Doe for five days, until November 14, and on that date, he met with Doe, Doe's mother and his attorney. Caruso also referred Doe to the Student Placement Committee (SPC), with the recommendation that Doe be expelled. Though ultimately its recommendations are reviewed by the School Board, the SPC is responsible for determining whether a student should be expelled or excluded. That same day, the SPC notified Doe's mother by letter that it was recommending that Doe be excluded from SFUSD and that she had the right to a due process "discussion" with the SPC on November 25. Pursuant to California Education Code § 48903(h), the Committee also continued Doe's suspension until a resolution of the exclusion proceedings.

By letter, plaintiff's counsel objected to use of the disciplinary procedures on the grounds that they violated the EAHCA and requested that the exclusion hearing be cancelled and an IEP team be convened. Plaintiff then sought relief in this court. On November 24, the day before the hearing, the court issued a temporary restraining order enjoining defendants from holding the hearing and requiring them to provide plaintiff with home tutoring. On December 10, the court issued a preliminary injunction enjoining the District to allow plaintiff to return to Louise Lombard, his then current placement, until pursuant to an IEP recommendation he was alternatively placed. On December 15, 24 school days after the initial incident, plaintiff returned to Louise Lombard.

Jack Smith is also an emotionally handicapped student with a propensity towards aggressive behavior. In February 1980, an IEP team recommended that Smith be given a special education placement in a regular school setting at A.P. Giannini School. The recommendation calls for a full-day program which includes three periods of Learning Disabled instruction, lunch, and "science on a trial basis." It states: "This program is on a trial basis dependent upon [Jack's] ability to adapt to a regular school."

Smith began school on this program in September 1980. After a series of behavioral problems, on October 14, the school

reduced his program to a half-day. Though the circumstances are disputed, at some point his grandparents agreed to the reduction. On November 14, Smith made sexual comments to some girl students, and admitted doing so to the school principal Marybeth Barrett. Barrett then suspended him for five days and referred him to the SPC. Again, it is undisputed that this conduct arose out of his handicap.

By letter of November 21, the SPC notified Smith's grandparents that the SPC was recommending that Smith be excluded from SFUSD and that a due process discussion was set for December 2. It also continued the suspension pending resolution of the case pursuant to § 48903(h). On November 28, Smith's counsel by letter objected to the exclusion proceeding as violative of the EAHCA and requested that in IEP team be convened.

Subsequently on December 1, the SPC cancelled the December 2 hearing and offered to place Smith on a half-day program at A.P. Giannini or provide him with home tutoring. However, because the SPC refused to allow Smith to return to his full-day program as requested, the grandparents chose home tutoring. Home instruction began on December 10, and an IEP team convened on January 6, 1981.

## II. *PLAINTIFFS' MOTIONS*

### A. The Threatened Exclusion/Expulsion

The parties dispute whether SFUSD threatened plaintiffs with expulsion under Cal. Ed. Code § 48904.5 or with exclusion pursuant to Cal. Ed. Code §§ 48212 and 48213. Although it appears to the court that plaintiffs were probably threatened with exclusion, there is also evidence which suggests that SFUSD intended expulsion. The court need not resolve this dispute, however, because in either case the threatened use of the disciplinary procedures would have violated plaintiffs' rights under the EAHCA and § 504, and defendants virtually concede this point. For a variety of reasons the courts have consistently held that, with the exception of suspensions, use of disciplinary procedures against handicapped children at least for conduct arising out of



their handicap violates the EAHCA and § 504,[1] and this court so

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[1] Section 504, 29 U.S.C. § 794, provides,

> [n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely, by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Health and Human Services' implementing regulations provide handicapped students with substantive and procedural rights similar to those guaranteed by the EAHCA. *See* 45 C.F.R. § 84.31-84.39. For instance, § 84.33 provides the right to a free appropriate education, and § 84.34(a) requires recipients of federal funds to provide handicapped students with education in the least restrictive environment. In ruling on the validity of applying disciplinary procedures to handicapped students, the courts have generally made no distinction between the EAHCA and § 504, *see, e.g., S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981); *Sherry v. New York State Education Department*, 479 F.Supp. 1328, 1338-39 (W.D.N.Y. 1979), and the defendants have not pressed any contrary contention in this action.

The only doubt as to the validity of the regulations comes from the possible implications of the Supreme Court's opinion in *Southeastern Commmunity College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979). In *Davis* the Court held that although "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory," *id.* at 412-13, § 504 does not impose affirmative action obligations on recipients of federal funds. *Id.* at 411-12. Insofar as health and Human Services' implementing regulations imposed such an obligation, the court concluded that they were invalid.

Since *Davis*, many courts have considered the validity of the implementing regulations in the education context, 45 C.F.R. § 84.31-84.39. Distinguishing *Davis* on several grounds, they have consistently upheld the validity of these regulations. *See, e.g., New Mexico Association for Retarded Citizens v. State of new Mexico*, 678 F.2d 847, 852-55 910th Cir. 1982); *Tatro v. State of Texas*, 625 F.2d 557, 564 and n.19 (5th Cir. 1980); *Phipps v. New Hanover County Board of Education*, 551 F.Supp. 732, 734 (E.D.N.C. 1982); *Georgia Association of Retarded Citizens v. McDaniel*, 511 F.Supp. 1263, 1280-81 (N.D. Ga. 1981). The court concurs in the analysis and conclusions of these cases. The regulations validly implement § 504's mandate that handicapped children be provided with the educational benefits realized by non-handicapped students. *New Mexico Association* at 853; *Phipps* at 734. Moreover,

held in issuing its December 12, 1980 order granting a preliminary injunction in this case. See, e.g., *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *Stuart v. Nappi*, 443 F.Supp. 1235 (d.Conn. 1978); *Sherry v. N.Y. State Dept. of Education*, 479 F.Supp. 1328 (W.D.N.Y. 1979).

First, both EAHCA and § 504[2] guarantee every handicapped student a free appropriate education in the least restrictive environment. However, when school officials expel or exclude a handicapped student, the student will be deprived of any education for at least some period of time, and, if the expelling school is the least restrictive environment, the student will be deprived of that right as well. *Stuart*, 443 F.Supp. at 1242-43. Second, § 1415(e)(3), the "stay-put" provision, provides:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child.

Thus, even if the current placement of a child is inappropriate, the child has the right to remain in that placement until a new appropriate placement is finally determined. Since exclusion and expulsion effect a change in placement—the child will be prohibited from attending school in the placement prescribed by the IEP team—they violate the EAHCA. *Kaelin*, 682 F.2d at 601; *Turlington*, 635 F.2d at 348. Finally, under the EAHCA and § 504[3] only a specialized team can determine what the appropriate placement is, subject to review by an impartial hearing officer. When the board of education expels a student, it usurps a function which it cannot perform legitimately under the law. *Stuart*, 443 F.Supp. at 1243. Accordingly, the threatened discipline violated plaintiffs' rights under EAHCA and § 504.

providing handicapped children with the procedural protections required by the regulations, such as education in the least restrictive environment and determination of appropriate placement by a specialized team, does not impose "undue financial and administrative burdens" on recipients of federal funds. *Davis*, 442 U.S. at 412. In light of the important rights secured, the modest expenditure of funds required cannot be deemed "undue." Furthermore, in direct contrast to *Davis*, these regulations are designed to provide handicapped children with the "rough equivalent" of the education provided the non-handicapped. *Id.* at 410. In *Davis*, the Court observed that § 504 does not place affirmative action obligations on "all" recipients of federal funds. *Id.* at 411. The Court then went on to discuss the possibility that some affirmative obligations may be required in some cases. *Id.* at 412. The instant action fits into this latter category.

[2] *See* 45 C.F.R. §§ 84.33, 84.34(a).



### B. The Extended Suspensions

Initially, defendants suspended plaintiffs for five days pursuant to Cal. Ed. Code § 48903(a). Plaintiffs concede, and the cases hold, that regular suspensions under state law do not constitute a change in placement and are valid under the EAHCA and § 504. *See, e.g., Stuart*, 443 F.Supp. at 1242. However, the parties dispute whether the extension of the five day suspensions purportedly imposed pursuant to § 48903(h) violated plaintiffs' rights under federal law. Defendants argue that any suspension permissible under state law is valid under the EAHCA and § 504, and plaintiffs insist on the contrary that any suspension beyond the five day period violates federal law. The cases provide a variety of views on whether and under what circumstances a school board can remove a handicapped child who is dangerous to him or herself or others. *Compare S-1 v. Turlington*, 635 F.2d at 348 n.9, *with Stuart*, 443 F.Supp. at 1242. *See also*, 34 C.F.R. § 300.513.

In ruling on the present motions, however, the court need not decide this question. Regardless of the extent of the emergency authority retained by defendants, in the instant case they did not act pursuant to that authority, and cannot now justify their actions on that basis. Rather, they purported to rely on § 48903(h). That section provides,

> In a case where expulsion is being processed by the governing board, the school district superintendent or other person designated him or her in writing may extend the suspension until such time as the governing board has

[3] *See* 45 C.F.R. § 84.36.

> rendered a decision in the action pursuant to Section 48914; provided, that the superintendent or the superintendent's designee has determined that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process.

Reliance on this section was misplaced. First, from the letter sent to plaintiffs' guardians, it appears that the SPC was recommending plaintiffs' expulsion. § 48903(h), however, only provides for extension of the five day suspension period pending expulsion not exclusion proceedings, which are governed by §§ 48212 and 48213. More importantly, even if expulsion were intended or § 48903(h) were applicable to exclusions, defendants still could not validly have used that provision to extend the suspensions of plaintiffs. § 48903(h) provides for extended suspensions in aid of expulsion. If expelling a handicapped student is illegal, then suspending in aid thereof cannot be justified. Finally, when delimiting the boundaries of SFUSD's retained authority, it is clear that it can only act upon a proper finding that a handicapped student is an immediate danger to him or herself or others. 34 C.F.R. § 300.513; *Turlington*, 635 F.2d at 348 n.9. In this case, the defendants made no such finding and at least for Smith, who has no history of violence, could not have.[4] It also failed to

[4] The finding required by § 48903(h) is much broader and was not properly made in this case. Before extending a suspension under § 48903(h) the SPC must find that "the presence of the pupil at the school . . . would cause a danger to persons or property or a threat to the instructional process." There is no indication of the section in the letters sent to the plaintiffs' parents and grandparents does not give rise to an inference that a finding was made. Even if the SPC made the finding, however, it failed to provide plaintiffs a hearing on the issue of their continuing dangerousness, certainly a necessary safeguard for exercise of any retained emergency authority.

In *Montoya v. Sanger Unified School District*, 502 F.Supp. 209 (E.D. Cal. 1980), the court held that before extending a suspension pursuant to § 48903(h), procedural due process requires that a school district provide a student with a hearing. Plaintiffs rely on this case in asserting a separate due process claim. Although the court concludes for other reasons that plaintiffs cannot now assert that claim, *see infra*, the court



provide necessary safeguards such as immediately convening an IEP team and providing the plaintiffs with alternative interim placements. *Turlington* at 348 n.9.

Accordingly, the court concludes that the extended suspensions violated plaintiffs' rights under the EAHCA and § 504, and grants plaintiffs summary judgment on this issue.

G. Injunctive and Declaratory Relief

The instant case is appropriate for declaratory and injunctive relief for the reasons stated in the court's December 12, 1980 order granting preliminary injunction. The plaintiffs would suffer irreparable harm if the SFUSD's exclusion or expulsion procedures were applied to them. Such action would deprive them of their Congressionally mandated right to a free appropriate education in the least restrictive environment, as determined by a group of experts familiar with their particular handicaps. Moreover, the balance of hardships tips decidedly in favor of plaintiffs. Although the hardships to defendant and the public interest in maintaining a safe and secure school environment are not insubstantial, these hardships and interests must be viewed in light of the strong national policy expressed in the EAHCA. Congress perceived the grave problems facing millions of handicapped children, and in enacting the EAHCA sought to assure that all handicapped children, including the emotionally handicapped, would receive a free appropriate education. To achieve this goal, Congress provided for federal funding for state educational programs for handicapped children and created important procedural safeguards to protect their rights. These include the right to remain in the student's existing placement while a new placement is being sought pursuant to the procedures required for changes in individ-

concurs in *Montoya's* analysis. The Fourteenth Amendment requires that the district provide a student with a hearing on the question of his or her continuing dangerousness before extending a suspension pursuant to § 48903(h). It is to be noted that the fact that a student has admitted engaging in misconduct, as in this case, does not obviate the need for a further hearing since the question of the student's continuing dangerousness is different from the question of whether the student has engaged in misconduct in the past.

ualized education programs. Moreover, the loss of even a short period of appropriate educational services can cause immeasurable damage to a handicapped child. The obligation is on the school to provide alternative arrangements within a current placement until an appropriate placement is found or agreement is reached with plaintiffs' guardians. *See* 45 C.F.R. § 84.34(a). Defendants also have the ability to suspend plaintiffs, if necessary, in accordance with the provisions of the California Education Code.

Additionally, this action is not moot. Even if defendant is not presently applying the expulsion/exclusion procedures to handicapped children, it may change its policy. *See City of Los Angeles v. Lyon,* 51 U.S.L.W. 4424 (April 20, 1983); *Pomerantz v. County of Los Angeles,* 674 F.2d 1288, 1291-92 (9th Cir. 1982). Moreover, because defendant still contends that it can utilize § 48903(h) to extend their suspensions of handicapped children, there is unquestionably a continuation of the same offending policy under a different name. There is also a substantial likelihood that plaintiffs would be subject in the future to impermissible disciplinary procedures, if not enjoined. *See City of Los Angeles* at 4426-27. Both young men are currently students within the jurisdiction of the SFUSD, and both continue to have serious emotional handicaps. There is a likelihood that they will again engage in misconduct arising out of their handicaps and consequently be subject to the disciplinary procedures.

Accordingly, the court will issue the requested declaratory and injunctive relief. Plaintiffs should submit a proposed permanent injunction and declaration of rights in conformance with this order within thirty (30) days from the date of this order.

D. Jack Smith

Plaintiff Jack Smith contends that defendants unilaterally changed his placement on October 14, 1980 by reducing his full-day program to a half-day. Defendants respond that the reduction was not a change in placement. Rather, they argue, the reduction was contemplated by his IEP, which called for a full-day on a trial basis only. they also contend that Jack's grandparents agreed to the reduction and thereby waived their right to object both to the



initial reduction and to the defendant's refusal to reinstate Jack on a full-day program on December 1, 1980.

The facts surrounding all of these issues are in dispute and therefore summary judgment is inappropriate. Without being exhaustive, the following are issues which remain for trial: (1) whether the reduction in Jack's program constituted a change in his placement under the February 1980 IEP; (2) whether his grandparents argeed to the reduction; (3) whether under the circumstances their consent can be deemed a voluntary waiver of their right to object to a change in placement; (4) whether the reduction, if invalid, caused or contributed to the conduct which led to Jack's five day suspension: (5) whether the grandparents waived the right to insist on Jack's being returned to a full-day program in December 1980; (6) whether Jack returned to his current placement at A.P. Giannini, whether his parents agreed to an alternative placement or he was placed pursuant to a revised IEP, and the pertinent date or dates on which such events occurred.

E. John Doe

The issues for trial regarding Doe are more narrow. Doe's five day suspension from November 6 to 13 was valid. The extended suspension commencing on November 14 violated his rights under the EAHCA and § 504. There remains an issue as to the date on which defendants first offered to allow him to return to Louise Lombard, i.e., was it before, after, or the date of this court's preliminary injunction.

II. DEFENDANTS' MOTIONS FOR RECONSIDERATION

In its May 25, 1982 order, the court ruled that § 504 provides a private cause of action for damages and that an action under 42 U.S.C. § 1983 lies for violation of § 504. The court also held that plaintiffs could not seek damages under the EAHCA but that a § 1983 action would lie for violation of the EAHCA. The court reserved the question of whether plaintiffs could recover damages under § 1983 for violation of the EAHCA. Defendants now move for reconsideration of the court's order. The court has reconsidered its previous rulings and affirms them with one exception.

Previously, the court concluded that despite the fact that the EAHCA provides a comprehensive remedial scheme, the Congress did not intend that it provide the exclusive remedy for protecting the rights of handicapped children. Upon further reflection, however, the court now concludes that though Congress has provided alternative remedial schemes, the comprehensiveness of the EAHCA manifests a Congressional intent to preclude relief based on the Act under § 1983. Under the EACHA Congress has provided for wide-ranging injunctive relief and even for limited damages in certain circumstances. *See Anderson v. Thompson*, 658 F.2d 1205, 1213-14 (7th Cir. 1981). To allow a damage remedy under § 1983 for violation of the EACHA would thwart the carefully structured remedial scheme of the Act. *See Anderson v. Thompson*, 658 at 1214-16; *Ruth Anne M v. Alvin Independent School Dist.*, 532 F.Supp. 460, 473-75 (S.D. Tex. 1982). Accordingly, plaintiffs may not seek damages under the EACHA or § 1983 for violation of the EACHA.

Defendant also requests the court to reverse its earlier holding that damages are available under § 504 and § 1983 for violations of § 504. It cites cases decided after this court's May 25 rulings in support of its position. In response plaintiff cites recent cases which affirm the court's conclusion. Having carefully reviewed the case law on this question, the court remains persuaded by the rationale of those cases concluding that damages are available under § 504 and § 1983 for violations of § 504. *Compare, e.g., Miener v. State of Missouri*, 673 F.2d 969, 977-79 (8th Cir. 1982) (§ 504 provides damage remedy); *Gelman v. Department of Education*, 544 F.Supp. 651 (D.C. Colo. 1982) (same); *Patton v. Dumpson*, 498 F.Supp. 933, 936-39 (S.D.N.Y. 1980) (same), *with Manecke v. School Board of Pinellas County, Florida*, 553 F.Supp. 787, 789-90 (M.D. Fla. 1982) (no damage remedy under § 504); *Ruth Anne M v. Alvin Independent School District*, 532 F.Supp. 460, 473 (S.D. Tex. 1982) (same). More importantly, although neither party has cited the case, in *Pomerantz v. County of Los Angeles*, 674 F.2d 1288 (9th Cir. 1982), the Ninth Circuit in effect held that § 504 provides a damage remedy and that § 1983 provides a cause of action for violations of § 504. In *Pomerantz*, three blind individuals brought suit challenging the county's policy of excluding blind people from jury service and



sought damages under § 504 and § 1983 for past injuries. The Ninth Circuit did not discuss the question of the availability of damages under these provisions. However, implicit in its determination that the defendants were entitled to quasi-judicial immunity from damages is the assumption that damages are available. *Id.* at 1291. Otherwise there would be no reason to reach the immunity issue. The court also held that on remand plaintiffs could seek attorneys' fees under both § 504a, 29 U.S.C. § 794, and 42 U.S.C. § 1988. Unfortunately the court provided little enlightenment on this critical area of uncertainty. However, its implicit holding is that damages are available under § 504 and § 1983. Accordingly, plaintiff can recover for all damages reasonably flowing from defendants' unlawful conduct.

At trial, plaintiffs may attempt to prove all damages which flow from the defendant's unlawful conduct. At this point, as an abstract matter the court cannot specify any further the appropriate measure of damages under either § 504 or § 1983. At oral argument, defendants suggested that plaintiffs may recover reimbursement for expenses incurred for any alternate educational services provided during the unlawful suspension or in the alternative the cost of educational services lost during that period. Whether the damages recoverable are so limited will be determined at trial after the court has heard further evidence. The parties may supplement the briefs already on file with any further case citations relevant to the question of the appropriate measure of damages.

Finally, at the hearing in this matter plaintiffs' counsel raised the question of whether defendants could claim the protection of a qualified immunity, thus putting their good faith in issue. Defendants have never raised this question during the two and a half years this case has been pending, and they have not asserted a qualified immunity as a defense in their answers to plaintiffs' complaints. At this late stage in the litigation, defendants cannot begin raising new defenses, particularly ones that could have been addressed by appropriate pre-trial motions that would test their validity. Moreover, the issues to which the defenses would be addressed have already been litigated and determined in this court's previous orders. Accordingly, the court concludes they

have waived any immunity defense they may otherwise have been entitled to under § 1983 and § 504. *See Pomerantz*, 674 F.2d at 1291 (holding that immunity applies to § 504 as well as § 1983). Nonetheless insofar as defendants' good faith is relevant on the question of damages, the court will, of course, consider evidence on this question.

## IV. PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM

Citing *Goss v. Lopez*, 419 U.S. 565 (1975) and *Montoya v. Sanger Unified School District*, 502 F.Supp. 209 (E.D. Cal. 1980), plaintiffs claim that defendants violated their procedural due process rights when they failed to afford them a hearing before extending their suspensions pursuant to § 48903(h). This claim is not cognizable, however, in light of the court's holding that defendants acted unlawfully in applying § 48903(h) to plaintiffs. Plaintiffs cannot make an independent constitutional claim that defendants failed to afford them a hearing when the court has held that defendants could not lawfully have proceeded under § 48903(h) at all. Plaintiffs are already entitled to relief for the unlawful extensions of their suspension. Accordingly, although defendant has not specifically so moved, the court grants defendant summary judgment on this claim.



## V. JURY TRIAL

Finally, defendants move under Fed. R. Civ. P. 39(b) for relief from waiver of the right to a jury trial. Defendants state that their previous counsel did not make a jury demand for tactical reasons but that present counsel believes that a jury trial is in their interest. This is no basis for relief from waiver, *see Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987-88 (9th Cir. 1980) (denial of relief where failure to file timely demand was due to counsel's inadvertance not abuse of discretion), and the motion is DENIED.

IT IS SO ORDERED.

Dated: June 6, 1983.

/s/ MARILYN HALL PATEL
United States District Judge

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United States District Court
Northern District of California

Civil No. C 80-4270-MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor,

v.

Bill Maher, et al.,
Defendants.

# Amended Answer of Defendant Wilson Riles to Complaint of Plaintiff-Intervenor

[Filed July 23, 1983]

Wilson Riles answers the complaint of intervenor as follows:

1. The first two paragraphs of the complaint are descriptive and defendant therefore neither answers nor denies the allegations of said paragraphs.

2. In answer to the allegations contained in paragraphs 3-6, defendant denies all of said allegations.

3. Defendant lacks sufficient information or belief upon which to admit or deny the allegations contained in paragraphs 6, 7, and 8 of the complaint and therefore denies all of the allegations of said paragraphs.

4. In answer to the allegations contained in paragraphs 15-36, defendant Riles lacks sufficient information or belief upon which



to admit or deny said allegations and therefore denies all of the allegations of said paragraphs.

5. Paragraphs 37-48 of the complaint purport to summarize applicable law with respect to education for handicapped students. Insofar as the allegations of said paragraphs are conclusions of law, defendant Riles neither admits nor denies them.

6. Defendant Riles denies the allegations contained in paragraphs 49-66 of the complaint.

## AFFIRMATIVE DEFENSES

7. Plaintiff-intervenor has not exhausted his administrative remedies, and thus with respect to defendant Riles has stated no grounds for relief from this Court or for jurisdiction to be vested in this Court. Specifically plaintiff has not exhausted the procedures provided by 20 U.S.C. section 1415 and the regulations promulgated in conformity with such title and by chapter 5 of part 30 (commencing with section 56000) of the California Education Code and the regulations promulgated thereunder.

8. This Court should abstain until the administrative procedure available to the local defendants and the plaintiff is exhausted.

9. At all times relevant to this action, defendant Wilson Riles was acting in good faith in his official capacity and not otherwise and he is therefore immune from liability.

WHEREFORE, defendant Riles prays that the complaint be dismissed, that defendant recover his costs of suit herein, and that the Court grant such other relief as to it seems proper.

DATED: July 28, 1983

JOHN K. VAN DE KAMP,
Attorney General
of the State of California
CHARLTON G. HOLLAND
Deputy Attorney General
/s/ ASHER RUBIN
Deputy Attorney General
Attorneys for State Defendant

JOHN K. VAN DE KAMP, Attorney General
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Attorneys for State Defendant

United States District Court
Northern District of California

Civil No. C 80-4270-MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor

v.

Bill Maher, et al.,
Defendants.

## AMENDED ANSWER TO FIRST AMENDED COMPLAINT CIVIL RIGHTS

[Filed July 28, 1983]

COMES NOW defendant Wilson Riles, individually and in his capacity as the California State Superintendent of Public Instruction, and answers the first amended complaint (Civil Rights) on file as follows:

1. Answering the allegations of paragraphs 3, 4, 5, and 6, denies that jurisdiction is vested in this Court over the action as pled in this complaint.

2. Answering the allegations of paragraphs 7, 14, 15, 16, 17, 18, 19, 20, 21 and 22, lacks sufficient information and belief to be able to answer the allegations of these paragraphs and on that basis denies each and every allegation contained therein. Defendant further alleges, in this regard, that an administrative procedure exists for the defendant Riles to make specific findings of



fact regarding those factual issues raised by the plaintiff, that that administrative procedure is authorized by 20 U.S.C. section 1415 and the regulations promulgated in conformity with and pursuant to the authority in such Title and pursuant to Chapter 5 of Part 30 (commencing with section 56000) of the Education Code and the regulations promulgated in conformity with and pursuant to the authority in such Code, and that this administrative procedure has not been exhausted by the plaintiff or the local defendants.

3. Answering the legal conclusions set forth from paragraph 23 through paragraph 34, these conclusions as conclusions of law are neither admitted nor denied.

4. Answering the allegations of paragraphs 35 through 47, denies each and every allegation contained therein and specifically denies defendant Riles has performed any act for which he is subject to any legal award or equitable relief from this Court.

## AFFIRMATIVE DEFENSES

1. The plaintiff has not exhausted his administrative remedies and thus, regarding the defendant Riles has stated no grounds for relief from this Court or for jurisdiction to be vested in this Court, in that the plaintiff has not exhausted the procedures set forth, authorized and required by 20 U.S.C. section 1415 and the regulations promulgated in conformity with and pursuant to the authority of such title, and by Chapter 5 of part 30 (commencing with section 56000) of the California Education Code and the regulations promulgated in conformity with and pursuant to the authority in such Code.

2. Pursuant to the allegations set forth in paragraph 1 of these affirmative defenses, this action as it relates to the defendant Riles is not ripe for adjudication.

3. Pursuant to the allegations set forth in paragraph 1 of these affirmative defenses, this Court should abstain until the administrative procedure available to local defendants and the plaintiff is exhausted.

4. Pursuant to the allegations set forth in paragraph 1, the defendant Riles is not at a point at which he can make a factual

finding or admission or denial regarding the allegations of this complaint and, on this basis, contends that no grounds exist upon which a legal award or equitable relief can be granted by this Court.

5. At all times relevant to this action, defendant Wilson Riles was acting in good faith in his official capacity and not otherwise and he is therefore immune from liability.

DATED: July 28, 1983

JOHN K. VAN DE KAMP,
Attorney General
of the State of California
CHARLTON G. HOLLAND
Deputy Attorney General
/s/ ASHER RUBIN
Deputy Attorney General
Attorneys for State Defendant



United States District Court
Northern District of California

No. C-80-4270 MHP

John Doe,
Plaintiff,
Jack Smith,
Plaintiff-Intervenor,

v.

William Maher, et al.,
Defendants.

Modified Judgment and Permanent Injunction

[Filed Jan. 23, 1987]

This court, having issued a judgment on December 2, 1983 setting forth a Declaration of Rights and Permanent Injunction against the San Francisco Unified School District ("SFUSD") and associated defendants, does hereby amend said judgment to conform to the mandate of the United States Court of Appeal for the Ninth Circuit following its decisions in Appeals numbered 83-2613 and 84-2720, and does hereby grant such modified judgment to plaintiff John Doe and plaintiff-intervenor, Jack Smith against the defendants SFUSD, William Maher, Rosario Anaya, Julie C. Anderson, Eugene S. Hopp, Myra Kopf, Peter Mezey, Superintendent Robert Alioto, Robert Figone, Henry Caruso, Marybeth Barrett, and their legal successors in office.

Plaintiffs are granted judgment in their favor as follows:

MONETARY DAMAGES

By stipulation between the plaintiff, John Doe and his guardian ad litem, [redacted] and the defendant, SFUSD, judgment is hereby entered in the amount of $1,600.00.

By stipulation between the plaintiff-intervenor, Jack Smith and his guardian ad litem, [redacted] and the defendant, SFUSD, judgment is hereby entered in the amount of $1,600.00.

## DECLARATION OF RIGHTS

Plaintiffs, as educationally handicapped children and residents of the City and County of San Francisco:

1. Have the right to the full benefits and protection of the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983, Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (formally EAHCA) and the regulations promulgated thereto;

2. Have the right to a free and appropriate public education, as defined by the EAHCA, from defendant SFUSD;

3. Have the right to education in the least restrictive environment suitable to their individual needs and with non-handicapped children to the extent appropriate within the meaning of the EAHCA;

4. Shall not be expelled for any behavior or misconduct which is a manifestation of their handicaps or which arises out of their handicaps;

5. Shall not be subjected to any disciplinary procedures with the exception of suspensions authorized by Cal. Educ. Code §§ 48910, 48911, 48912 or other less substantial informal and reasonable disciplinary measures for dealing with children who are endangering themselves or others, provided that they are not suspended indefinitely and the disciplinary procedure does not constitute a change in program for any behavior or misconduct which is a manifestation of their handicap(s) or which arises out of their handicap(s);

6. Shall not have their educational program reduced for any behavior or misconduct which is a manifestation of their handicap(s) or which arises out of their handicap(s) unless the change is contemplated by their Individualized Educational Program ("IEP"), promotes valid educational goals and the parents are afforded all of the rights under EAHCA including the right to review any reduction in program;

7. Shall not be denied or totally expelled or excluded from having any educational services whatsoever provided by the



SFUSD unless it is the result of behavior which has been properly determined to be unrelated to the student's handicap;

8. Have the right to have the determination of appropriate education, placement, and services for them made by a specialized multi-disciplinary IEP team, subject to review by an impartial hearing officer;

9. Have the right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, 34 C.F.R. §§ 300.340-300.349 and 300.500-300.514;

10. Have the right pursuant to 20 U.S.C. § 1415(b)(1) to a written notice to their parents or guardians within a reasonable time before the SFUSD proposes to change their educational placement program or services or the provision of free appropriate public education to them, including an explanation of all procedural safeguards available to the pupil and parents, a description of why the SFUSD proposes to take the action and a description of all options the SFUSD considered and the reasons why those options were rejected;

11. The right to a comprehensive evaluation, as required by 34 C.F.R. § 104.35, before having any significant changes in educational placement or program recommended by the SFUSD;

12. Have the right, whenever a change of placement or educational program or service is recommended as a result of their behavior or misconduct, to have a meeting of an IEP team pursuant to 34 C.F.R. §§ 300.340-300.349, to determine whether the behavior or misconduct was a manifestation of the pupil's handicap(s) and together with the parents determine whether the pupil's current IEP, if any, is appropriate and is being correctly implemented; if consensus between the IEP team and the parents cannot be reached the agency must develop a plan consistent with all information obtained and must allow the parents an opportunity for a due process hearing concerning the plan;

13. Have the right to remain, except during a period of authorized suspension, in their current placements pending the IEP team meeting or other proposal to change the educational placement of the child or the provision of a free and appropriate public education, and all administrative and judicial review of such determination, unless the parent or guardian and the SFUSD agree otherwise;

14. Have the right to be free from any further disciplinary action if the IEP team determines the IEP is not appropriate or is not being implemented correctly.

The court further declares that:

The use of any disciplinary procedures, with the exception of suspensions authorized by Cal. Educ. Code §§ 48910, 48911, 48912 or any reasonable and informal but less substantial measures against handicapped children for conduct or behavior arising out of their handicap(s) violates the EAHCA.

California Education Code § 48900 *et seq.* relating to expulsion, and any state or SFUSD administrative regulation or policy promulgated pursuant thereto applied to plaintiffs as handicapped students of the SFUSD, violate the EAHCA because they fail to make any exception for handicapped children.

California Education Code § 48911(g) shall only be applied once an IEP team has properly determined that a handicapped student's misbehavior was not a manifestation of the handicap, or is not handicap-related.

California Education Code § 48915.5(g) is invalid to the extent that it conflicts with the express terms of 20 U.S.C. § 1415(e)(2) and to that extent shall not be enforced.

California Education Code §§ 48212-48214, and any state or SFUSD administrative regulation or policy promulgated pursuant thereto which purports to authorize exclusion of students on the basis of physical or mental handicaps violate the EAHCA and are invalid.



California Education Code § 48915.5(e) violates the EAHCA and is invalid insofar as it fails to require that an IEP team consider the results of an independent educational evaluation performed pursuant to 34 C.F.R. § 104.35 (1985) before recommending a handicapped child for expulsion proceedings.

## PERMANENT INJUNCTION

The court having thus determined that the SFUSD defendants violated these rights of the plaintiffs secured by the EAHCA 22 permanently enjoins the SFUSD, defendants, as follows:

1. Defendants are permanently enjoined from referring, recommending, or otherwise processing such handicapped pupils for expulsion, exclusion, or disciplinary procedures with the exception of suspensions authorized by Cal. Educ. Code §§ 48910, 48911, 48912, or any less substantial informal and reasonable disciplinary measures provided they are not suspended indefinitely and the disciplinary measures do not constitute a change in program, for behavior or misconduct which is a manifestation of or arises out of a pupil's handicap(s).

2. Defendants are permanently enjoined from extending suspensions of handicapped pupils pursuant to Cal. Educ. Code § 48915.5(g), or any state or local administrative regulation or policy purporting to supercede the provisions of 20 U.S.C. § 1415(e)(2).

3. Defendants are permanently enjoined from referring plaintiffs for disciplinary proceedings with the exception of suspensions authorized by Cal. Educ. Code §§ 48910, 48911, 48912 or any less substantial informal and reasonable disciplinary measures provided they are not suspended indefinitely and the disciplinary measure does not constitute a change in program pursuant to San Francisco Board of Education Policy No. 5114.

4. Defendants are permanently enjoined and shall convene an IEP team meeting whenever a change of placement or

program is recommended as a result of the pupil's behavior or misconduct.

5. Defendants are permanently enjoined and the IEP team shall determine whether the behavior or misconduct was or was not a manifestation of the pupil's handicap(s) or handicapping condition(s) and shall determine with the parents whether or not the pupil's current IEP, if any, is appropriate and is being correctly implemented, if no consensus between the IEP and the parents can be reached the agency shall make a determination and must allow the parents a due process hearing on the matter.

6. If the IEP team determines that the pupil's behavior or conduct was a manifestation of the handicapping condition(s), or the pupil's IEP was not appropriate or being correctly implemented, defendants are permanently enjoined from changing the pupil's placement or program except as otherwise provided in this order.

7. Defendants are permanently enjoined from denying handicapped pupils their right to remain in their current placement pending resolution of the issues delineated in paragraph 6 above and of any proceedings relating to the placement and provision of a free appropriate public education, unless the parents or guardian and the SFUSD otherwise agree.

8. Defendants are permanently enjoined and shall provide proper notice to parents or guardians of proposed changes of placement and changes in the provision of a free appropriate public education including, but not limited to, a description of procedural safeguards available to them, the action proposed by the SFUSD and the reasons therefor, the options considered, and the reason any options were rejected.

9. Defendants are permanently enjoined from changing a handicapped student's educational placement, instruction, and/or services prior to convening an IEP team pursuant to 34 C.F.R. §§ 300.340-300.349 and to review all relevant information and recommend such changes if necessary.



10. Defendants are permanently enjoined from recommending or effecting any significant change of placement, program, or services for such handicapped pupils as a result of behavior or conduct which was a manifestation of the pupil's handicap(s) without first conducting an evaluation of the pupil's needs in accordance with 34 C.F.R. § 104.35.

11. Defendants are permanently enjoined from applying Cal. Educ. Code §§ 48212-48214 to handicapped pupils regardless of the nature or severity of their handicap(s).

12. Defendants are permanently enjoined from denying plaintiffs a free and appropriate public education in the least restrictive environment or otherwise violating the provisions of 20 U.S.C. § 1401 *et seq.*, as amended or the regulations promulgated thereunder.

13. Defendants are permanently enjoined from conducting any hearing to expel or exclude plaintiffs Doe or Smith for behavior or conduct arising from their handicaps or which is a manifestation of their handicaps.

Defendants are permanently enjoind and shall expunge any and all records and notations in their students' files which refer to the unlawful and enjoined disciplinary action taken against Doe and Smith or to this lawsuit, and that attendance and credit for the time during which he was illegally excluded from his regular educational placement.

Incorporated herein by this reference are the Preliminary Injunction issued December 12, 1980, the Memorandum and Decision issued May 25, 1982, the Order issued June 17, 1983, and the Declaration and Permanent Injunction issued October 24, 1983 and the decisions of the United States Court of Appeals for the Ninth Circuit set forth in Opinions nos. 83-2613 and 84-2720 filed July 11, 1986 and July 28, 1986 respectively and Order no. 84-2720, filed November 18, 1986.

Pursuant to § 2 of the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 (Aug. 5, 1986), plaintiffs as prevailing parties, are awarded reasonable attorneys' fees and costs in an amount to be determined upon the submission of

appropriate affidavits by plaintiffs' counsel within thirty (30) days of the date of this order. Defendants shall have thirty (30) days from filing of plaintiffs' papers to respond at which time the matter will be deemed submitted.

IT IS SO ORDERED.

Dated: January 23, 1987

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge



United States District Court
Northern District of California

No. C-80-4270-MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor,

vs.

Bill Maher, et al.,
Defendants.

## ORDER AND PERMANENT INJUNCTION

[Filed April 23, 1984]

Plaintiffs John Doe and Jack Smith brought this action against the San Francisco Unified School District (SFUSD), various local officials, California School Superintendent Wilson Riles individually and in his official capacity, and against the successors of those officials. Plaintiffs alleged violations of the Education Act for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401-1461, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the fourteenth amendment. On October 24, 1983 the court issued a Declaration and Permanent Injunction with respect to the local defendants, and both parties have now moved for summary judgment with respect to plaintiffs' claim against the State defendants. Plaintiffs seek a Declaration and Permanent Injunction with respect to the State defendants.

The parties have reached a number of stipulations and filed a joint statement of issues in conjunction with their cross motions for summary judgment. The state defendants have stipulated that in November 1980, when, without adequate proceedings having been held, plaintiffs were suspended and recommended for expulsion on the basis of actions arising out of their handicaps, "there was no state policy concerning discipline of handicapped students disseminated to local educational agencies.

Having considered all of the pleadings, memoranda, and exhibits filed, as well as the oral arguments made on February 6, 1984, this court granted summary judgment to the plaintiffs against

defendants Wilson Riles and his successor Bill Honig, as superintendents of the Department of Education for the State of California.

The court hereby grants plaintiffs' request for declaratory and injunctive relief against the State defendants, and declares:

## DECLARATION OF RIGHTS

Plaintiffs, as educationally handicapped children in the State of California:

1. Have the right to the full benefits and protection of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, the Education for All Handicapped Children Act 20 U.S.C. § 1401 *et seq.* ("EAHCA"), § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations promulgated thereto;

2. Have the right to a free and appropriate public education, as defined by the EAHCA, provided by their local educational agency ("LEA") and/or the State Department of Education ("SDE");

3. Have the right to education in the least restrictive environment suitable to their individual needs and with non-handicapped children to the extent appropriate within the meaning of the EAHCA;

4. Shall not have their educational program reduced, or be expelled, excluded, or subjected to any other disciplinary procedures, with the exception of suspensions authorized by California Education Code §§ 48901 and 48911(a), for any behavior or misconduct which is a manifestation of their handicaps or which arises out of their handicaps;

5. Shall not as a result of behavior or misconduct which is a manifestation of their handicap be denied or totally expelled or excluded from having any educational services whatsoever;

6. Have the right to have the determination of appropriate education, placement, and services for them made by a special-



ized multidisciplinary "IEP" team, subject to review by the State or an impartial hearing officer;

7. Have the right to have any changes of placement effectuated in accordance with the procedures prescribed by 20 U.S.C. § 1415, 34 C.F.R. §§ 300.340-.349 and 300.500-.514;

8. Have the right to a written notice to their parents or guardians within a reasonable time before the LEA proposes to change their educational placement program or services or the provision of free appropriate public education to them, including an explanation of all procedural safeguards available to the pupil and parents, a description of why the LEA proposes to take the action, and a description of all options the LEA considered and the reasons why those options were rejected;

9. Have the right to a comprehensive evaluation, as required by 34 C.F.R. § 104.35, before having any significant changes in educational placement or program recommended by the LEA;

10. Have the right, whenever a change of placement or educational program of service is recommended as a result of their behavior or misconduct, to have a meeting of a multidisciplinary team, pursuant to 34 C.F.R. § 300.340-300.349, convened within 5 schooldays of the initiation of disciplinary action, to determine by a majority of the IEP team whether the behavior or misconduct was a manifestation of the pupil's handicap(s) and whether the pupil's current IEP, if any, is appropriate and is being correctly implemented;

11. Have the right to remain in their current placements pending the IEP team meeting or other proposal to change the educational placement of the child or the provision of a free and appropriate public education, and all administrative and judicial reviews of its determination, unless the parent or guardian and the LEA or State Department of Education agree otherwise;

12. Have the right to be free from any further disciplinary action if the IEP team determines either that the behavior or misconduct is a manifestation of or arises from the handicapping condition, or, that the IEP is not appropriate or is not being implemented correctly.

The court further declares that:

The use of any disciplinary procedures, with the exception of 5-day suspensions authorized by California Education Code § 48911(g), against handicapped children for conduct or behavior arising out of their handicap(s), violates the EAHCA and § 504;

California Education Code § 48900 *et seq.* relating to expulsion, and any state or local administrative regulation or policy promulgated pursuant thereto applied to plaintiffs as handicapped students, violates the EAHCA and § 504.

The application of California Education Code § 48911(g), or any other state statutes or regulations in aid of expulsion, exclusion, or extended suspension, violates plaintiffs' rights under the EAHCA and § 504, where such expulsion, exclusion, or extended suspension is based on behavior arising out of the child's handicap; and

California Education Code § 48212, and any state or local administrative regulation or policy promulgated pursuant thereto which purports to authorize exclusion of students on the basis of physical or mental handicaps violates the EAHCA and § 504.

## PERMANENT INJUNCTION

The court, having determined that the state defendants failed adequately to protect plaintiffs' rights under the EAHCA, § 504, and 42 U.S.C. § 1983, permanently enjoins the state defendants, as follows:

1. Defendants are permanently enjoined from referring, recommending, or otherwise processing such handicapped pupils for expulsion, exclusion, extended suspension or other disciplinary procedures, or from authorizing such actions, with the exception of 5-day suspensions authorized by California Education Code § 48911(a), as a result of behavior or misconduct which is a manifestation of or arises out of a pupil's handicap(s);

2. Defendants are permanently enjoined and shall require or convene an IEP team meeting within 5 schooldays whenever a change of placement or program is recommended as a result of the pupil's behavior or misconduct;



3. Defendants are permanently enjoined and shall determine or require determination by a majority of such IEP team as to whether the behavior or misconduct was or was not a manifestation of the pupil's handicap(s) or handicapping condition(s) and whether or not the pupil's current IEP, if any, is appropriate and is being correctly implemented;

4. If a majority of the IEP team determines that the pupil's behavior or conduct was a manifestation of the handicapping condition(s), defendants are permanently enjoined from subjecting the pupil to further disciplinary action or authorizing such disciplinary action based on said conduct;

5. Defendants are permanently enjoined from authorizing the denial or denying handicapped pupils their right to remain in their current placement pending resolution of the issues delineated in paragraph (4) above and of any proceedings relating to placement and provision of a free appropriate public education, unless the parents or guardian and the LEA otherwise agree;

6. Defendants are permanently enjoined and shall require or provide proper notice to parents or guardians of proposed changes of placement and changes in the provision of a free appropriate public education including, but not limited to, a description of procedural safeguards available to them, the action proposed by the LEA and the reasons therefor, the options considered, and the reason any options were rejected;

7. Defendants are permanently enjoined from authorizing a change of, or changing, a handicapped student's educational placement, instruction, and/or services prior to convening an IEP team pursuant to 34 C.F.R. §§ 3300.340-.349 to review all relevant information and recommend such changes if necessary;

8. Defendants are permanently enjoined from authorizing or recommending or effecting any significant change of placement, program, or services for such handicapped pupils as a result of the pupil's behavior or conduct which was a manifestation of the pupil's handicaps without first conducting an evaluation of the pupil's needs in accordance with 34 C.F.R. § 104.35;

9. Defendants are permanently enjoined from authorizing the application of, or applying, California Education Code § 48212 to handicapped pupils regardless of the nature or severity of their handicap(s);

10. Defendants are permanently enjoined from authorizing the denial of, or otherwise denying, plaintiffs a free and appropriate public education in the least restrictive environment or otherwise violating the provisions of 20 U.S.C. § 1401 *et seq.*, as amended, 29 U.S.C. § 794, or the regulations promulgated thereunder;

11. Defendants are permanently enjoined from authorizing any hearing to expel or exclude plaintiffs Doe or Smith for behavior or conduct arising from their handicaps or which is a manifestation of their handicaps;

12. The court finds that there is an absence of state policy in the following areas and that the failure to adopt policy is likely to result in continued violation of the right of plaintiffs and other similarly situated handicapped students to a free appropriate public education as required by the EAHCA and, therefore, the state defendants are permanently enjoined:

(a) to provide services directly when, in any individual case, they determine that a local educational agency is unable or unwilling to establish and maintain programs of free appropriate public education; services shall be provided by the State directly when, for example, the local educational agency fails either to develop or implement an IEP determination, and also fails properly to appeal such determination to the State educational agency;

(b) to ensure that all local educational agencies within the State are carrying out the provisions of the EAHCA, thereby assuring that all handicapped children are receiving a free appropriate education as defined by that Act and as amplified in this injunction; to ensure local compliance the state defendants must either enact a policy or set of regulations implementing this injunction that will be binding upon the local educational agencies, or must establish a system of monitoring which is adequate to ensure that all the local educational agencies are complying fully with the EAHCA and this injunction; the state defendants



are therefore enjoined to submit to the court for its approval, within sixty (60) days of the date of this order, either a proposed binding policy, regulations, or a proposed monitoring plan; said policy, regulation or plan shall include provisions for assuring compliance with ¶¶ 1-11 of this Order.

## RETENTION OF JURISDICTION

This court shall retain jurisdiction over the subjects of the complaint in this lawsuit for two (2) years from the date of this order.

IT IS SO ORDERED.

Dated: April 23, 1984

/s/ MARILYN HALL PATEL
MARILYN HALL PATEL
United States District Judge

United States District Court
Northern District of California

C-80-4270-MHP

John Doe,
Plaintiff

Jack Smith,
Plaintiff-Intervenor,

vs.

Bill Maher, et al.,
Defendants.

Judgment
Fed. R. Civ. P. 58

[Filed April 23, 1984]

This action having come before this court, the Honorable Marilyn Hall Patel, United Stated District Judge presiding, and the issues having been duly presented on a motion for summary judgment and for declaratory relief and permanent injunction and an order having been duly filed herein on this date,

IT IS ORDERED AND ADJUDGED that the motion of plaintiff John Doe and plaintiff-intervenor Jack Smith for summary judgment, declaratory judgment and a permanent injunction against defendants Wilson Riles and his successor Bill Honig as superintendents of the Department of Education for the State of California, is GRANTED in part in accordance with this court's order entered this date.

IT IS FURTHER ORDERED AND ADJUDGED that insofar as the order denies or fails to give relief to claims sought by plaintiff the action is DISMISSED.

Dated: April 23, 1984

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge



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Attorneys for State Defendants

United States District Court
Northern District of California

Civil No. C 80-4270 MHP

John Doe, Plaintiff,
Jack Smith, Plaintiff-Intervenor,

v.

Bill Maher, et al., Defendants.

Notice of Appeal

[Filed May 17, 1984]

NOTICE IS HEREBY GIVEN that defendant State Superintendent of Public Instruction hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the district court filed on April 23, 1984.

DATED: May 17, 1984

JOHN K. VAN DE KAMP
Attorney General
CHARLTON G. HOLLAND
Deputy Attorney General

/s/ ASHER RUBIN
Asher Rubin
Deputy Attorney General

United States District Court
Northern District of California

No. C-80-4270 MPH

John Doe, Plaintiff,
Jack Smith, Plaintiff-Intervenor,

vs.

Bill Maher, et al., Defendants.

Order Re Issuance

[Filed Aug. 31, 1984]

On April 23, 1984 this court issued an order and permanent injunction in this case declaring that plaintiffs, as educationally handicapped children in the State of California, have certain rights and enjoining the state defendants to take certain actions to protect these rights. In particular the court required that the state defendants either enact a policy or set of regulations requiring local educational agencies to comply with the court's injunction, or that they establish a system of monitoring to ensure that the local agencies are fully complying with the injunction. The state, choosing the option of enacting a policy, submitted a policy to the court for approval on August 17, 1984. On August 27, 1984 plaintiffs submitted a letter to the court objecting to certain aspects of the state's proposed policy.

With one minor modification the court approves the policy submitted by the state defendants. In line 5, paragraph 2 of page 12 of the proposed policy the state shall substitute "shall" for "may" to make it clear to local districts that the reference of handicapped students for expulsion or any other disciplinary proceding, including the discipline set forth in Cal. Educ. Code § 48212, is prohibited where the misconduct arose out of the student's handicapping condition or inappropriate placement.

In all other respects the state's policy is approved. It fully complies with the court's order and gives the local districts clear guidance on how they must protect the rights of handicapped students.



Plaintiffs' objections to the proposed policy are by and large picayune, insisting upon unnecessary petty word changes or resulting from a misreading of this court's order. In particular, the court's order of April 23 requires that the state *either* enact a binding policy *or* establish a system of monitoring to assure local compliance. The state need not take both steps. *Doe v. Maher, et al.*, slip op. (N.D. Cal. April 23, 1984) (¶ 12(b)). Moreover, although the court's order requires the state to provide services directly when the local agency is unable or unwilling to establish adequate programs, the state is not required to include this obligation in the policy governing local districts. *Id.* Indeed, the inclusion of this duty in such a policy would make little sense since the obligation to provide services directly in the event of a local agency's failure to provide such services lies with the state rather than with the local agency governed by the proposed policy.

In sum, considered as a whole and with the one modification noted above the proposed policy fully complies with this court's order and is hereby approve. The state defendants shall make the indicated modification and issue and distribute the policy within the (10) days of the date of this order.

IT IS SO ORDERED.

Dated: Aug 31 1984.

/s/ MARILYN HALL PATEL
United States District Judge

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CV NO. C 80-4270 MHP

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Bill Maher, et al.,
Defendants.

## STIPULATIONS BETWEEN STATE DEFENDANTS AND PLAINTIFFS

[Filed Jan. 11, 1984]

1. Plaintiff John Doe is a resident of San Francisco and a student in the San Francisco Unified School District (SFUSD).

2. Plaintiff Doe is declared eligible for special education services by SFUSD.

3. Plaintiff Jack Smith is a resident of San Francisco and a student in the SFUSD.

4. Plaintiff Smith is declared eligible for special education services by SFUSD.

5. Plaintiffs are educationally handicapped children eligible for special education and related services pursuant to the Education for All Handicapped Children Act (EAHCA), as amended, the regulations promulgated pursuant thereto, and California Education Code sections 56000 et seq.



6. Plaintiffs are handicapped individuals within the meaning of section 504 of the Rehabilitation Act of 1973.

7. The SFUSD receives funds from the State Department of Education (SDE) pursuant to the EAHCA.

8. As a recipient of federal funds for the education of handicapped children, the SFUSD has assured the SDE that it will comply with all of the requirements of the EAHCA and section 504.

9. As a recipient of federal funds for the education of handicapped children, the SDE has assured the United States Department of Education that the state, the State Department of Education, and all of its local education agencies will comply with all of the requirements of the EAHCA and section 504.

10. Defendant Wilson Riles, and now his successor Bill Honig, is the executive officer of the State Board of Education, and the State Director of Education, responsible for all executive and administrative functions of the California State Department of Education.

11. The California State Superintendent of Public Instruction, Bill Honig, is responsible at the state level for administering the provisions of Part 30 of the California Education Code governing special education.

12. Defendant Honig is responsible for administering California Education Code provisions that implement plaintiffs' right to a free appropriate public education pursuant to the EAHCA (20 U.S.C. § 1401 et seq., as amended) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794).

13. The State Department of Education is required by 20 U.S.C. sections 1412(4) and 1414(a)(5) to assure that each local educational agency in the state establishes and maintains an individualized education program for each handicapped student.

14. The State Department of Education will include the following in its policy concerning discipline of handicapped students:

(A) Before changing a handicapped student's educational placement, instruction, and/or services, local educational agencies are required to convene an IEP team meeting pursuant to 34 C.F.R. sections 300.340.349 and to review all relevant information and recommend such changes, if necessary.

(B) Local educational agencies will provide proper notice to parents or guardians of proposed changes of placement and changes in the provision of a free appropriate public education. The notice shall include but shall not be limited to, a description of procedural safeguards available to them, the action proposed by the District and the reasons therefor, the options considered, and the reason any options were rejected;

(C) Local educational agencies will convene an "IEP" team meeting whenever a change of placement or program is recommended as a result of the pupil's behavior or misconduct.

(D) The "IEP" team will determine whether the behavior or misconduct was a manifestation of the pupil's handicap(s) and whether the pupil's current IEP is appropriate and is being correctly implemented.

(E) If the IEP team determines that the pupil's behavior or misconduct was a manifestation of the handicapping condition, said pupil will not be subjected to disciplinary action related to such conduct.

15. In November 1980, there was no state policy concerning discipline of handicapped students disseminated to local educational agencies.

16. Exhibits A and B to the State Defendants' Status Certificate dated November 18, 1983, constitute the current position of the State concerning discipline of handicapped students.



17. Whenever an individual with exceptional needs is suspended more than one time in a semester an IEP meeting should be held in conformance with the state's policy to determine whether the student's misconduct is a manifestation of his or her handicap, and whether the pupil's current IEP is appropriate and is being properly implemented.

DATED: January 6, 1984

/s/ ASHER RUBIN
Deputy Attorney General

DATED: January 10, 1984

/s/ SHEILA BROGNA
TOBY FISHBEIN
Attorneys for Plaintiff

United States District Court
Northern District of California

No. C-80-4270-MHP

John Doe,
Plaintiff,

Jack Smith,
Plaintiff-Intervenor,

vs.

Bill Maher, et al.,
Defendants.

Amended Order Re Issuance of Policy

[Filed Oct. 2, 1984]

On April 23, 1984 this court issued an order and permanent injunction in this case declaring that plaintiffs, as educationally handicapped children in the State of California, have certain rights and enjoining the state defendants to take certain actions to protect these rights. In particular the court required that the state defendants either enact a policy or set of regulations requiring local educational agencies to comply with the court's injunction, or that they establish a system of monitoring to ensure that the local agencies are fully complying with the injunction. The state, choosing the option of enacting a policy, submitted a policy to the court for approval on August 17, 1984. On August 27, 1984 plaintiffs submitted a letter to the court objecting to certain aspects of the state's proposed policy.

With one minor modification the court approves the policy submitted by the state defendants. In line 5, paragraph 2 of page 12 of the proposed policy the state shall substitute "shall" for "may" to make it clear to local districts that the reference of handicapped students for expulsion or any other disciplinary proceeding is prohibited where the misconduct arose out of the student's handicapping condition or inappropriate placement. The policy shall state that exclusion pursuant to Cal. Educ. Code § 48212 is prohibited with respect to all handicapped children



regardless of whether the misconduct arises out of or was a manifestation of the pupil's handicap.

In all other respects the state's policy is approved. It fully complies with the court's order and gives the local districts clear guidance on how they must protect the rights of handicapped students.

Plaintiffs' objections to the proposed policy are by and large picayune, insisting upon unnecessary petty word changes or resulting from a misreading of this court's order. In particular, the court's order of April 23 requires that the state *either* enact a binding policy *or* establish a system of monitoring to assure local compliance. The state need not take both steps. *Doe v. Maher, et al.*, slip op. (N.D. Cal. April 23, 1984) (¶ 12(b)). Moreover, although the court's order requires the state to provide services directly when the local agency is unable or unwilling to establish adequate programs, the state is not required to include this obligation in the policy governing local districts. *Id.* Indeed, the inclusion of this duty in such a policy would make little sense since the obligation to provide services directly in the event of a local agency's failure to provide such services lies with the state rather than with the local agency governed by the proposed policy.

In sum, considered as a whole and with the one modification noted above the proposed policy fully complies with this court's order and is hereby approved. The state defendants shall make the indicated modification and issue and distribute the policy within ten (10) days of the date of this order.

IT IS SO ORDERED.

Dated: October 2, 1984.

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge

United States District Court
Northern District of California
NO. C-80-4270-MHP

John Doe,
Plaintiff,
Jack Smith,
Plaintiff-Intervenor

vs.

Bill Maher, et al.,
Defendants.

## ORDER RE CLARIFICATION

[Filed Oct. 2, 1984]

Defendants have moved upon unnoticed motion for clarification of certain orders which are now before the Court of Appeals for this Circuit. Plaintiff has responded in opposition and requests a hearing on the motion. The court has reviewed the papers and concludes that argument is not necessary and issues this order for clarification purposes.[1]

This court in its orders of October 24, 1983 and April 23, 1984 relating to defendant San Francisco Unified School District and the various state defendants, respectively, declared that § 48212 of the California Education Code violates the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. §§ 401-1461, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The court enjoined the application of § 48212 to all handicapped pupils.[2]

---

[1] Ordinarily when a judgment is appealed the District Court loses jurisdiction over the matter. However, this Circuit has recognized certain exceptions to this rule and the court concludes that the motion may be treated under the exception that allows the District Court to "act to assist the Court of Appeals in the exercise of its jurisdiction." *Davis v. United States*, 667 F.2d 822 (9th Cir. 1982).

[2] The october 24, 1983 Order referred to §§ 48212-48214. The April 23, 1984 Order refers to § 48212 and provisions implementing it. Secs. 48213 and 48214 are merely procedural provisions for the implementation of § 48212. It is the substance of § 49212 that is inimical to the federal statutes involved here.



The proscription and injunction of the two orders applies to all handicapped children regardless of whether their misconduct triggering disciplinary action is a manifestation of or arises out of the handicapped or handicapping condition. Each of the orders is clear in this respect and specifically treats *exclusion* under § 48212 different from other forms of disciplinary actions such as suspension and expulsion. It should be pointed out that these terms have distinct and different meanings in the California Education Code. Sec. 48212 was treated differently from other provisions of the Education Code having to do with expulsion and suspension.

It appears that the Order Re Issuance of Policy filed August 31, 1984 creates some confusion. Therefore the following is stricken from that order at page 2, lines 4-5:

> ", including the discipline set forth in Cal. Educ. Code § 48212,".

The following sentence is added to that paragraph at page 2, line 7:

> "The policy shall state that exclusion pursuant to Cal. Educ. Code § 48212 is prohibited with respect to all handicapped children regardless of whether the misconduct arises out of or was a manifestation of the pupil's handicap."

An Amended Order re Issuance of Policy is filed herewith and attached to this Order.

It should be further noted that references in the April 23, 1984 order to Cal. Educ. Code § 48911(g) has the same purpose and effect as reference to § 48903(h) in the October 24, 1983 order. Sec. 48903 was repealed by Cal. Stats. 1983, C. 498 and reenacted as § 48911.

IT IS SO ORDERED.

Dated: October 2, 1984

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge



United States District Court
Northern District of California
No. C-80-4270-MHP

John Doe,
Plaintiff,
Jack Smith,
Plaintiff-Intervenor,

vs.

Bill Maher, et al.,
Defendants.

## FURTHER ORDER RE DEFENDANT'S REQUEST FOR CLARIFICATION

[Filed Nov. 13, 1975]

Defendants have requested a further clarification of this court's orders, suggesting they are inconsistent at least insofar as one of the orders approves a statement of policy adopted by the state defendants pursuant to an earlier court order. The purported inconsistency thay ask the court to resolve is one this court has already declined to resolve. That issue is whether expulsion, suspension or other disciplinary action may be taken with respect to handicapped children whose misconduct is not a manifestation of their handicap.

The court once again declines the invitation. It was and remains unnecessary to reach this issue in this case. In each of the instances before this court the disciplinary action was taken in response to behavior that arose out of the handicap. There is no set of facts before the court that justifies expanding the analysis to conduct which is not a manifestation of the handicap.

The statement of policies submitted by the State defendants touches upon many practices and procedures not before this court. The court's approval of the policy is limited to those provisions adopted or modified as a result of the court's order. It reaches no other provision which the State may have included in its policy and the court offers no opinion regarding those other provisions. They are beyond the scope of the controversy before

this court. Accordingly, there is no issue upon which further clarification is needed.

IT IS SO ORDERED.

Dated: November 13, 1984

/s/ MARILYN HALL PATEL
Marilyn Hall Patel
United States District Judge



Supreme Court of the United States

No. 86-728

Bill Honig, California Superintendent of Public Instruction, Petitioner

v.

John Doe and Jack Smith

ORDER ALLOWING CERTIORARI. Filed February 23, 1987.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit*, is granted, limited to Questions 1 and 3 presented by the petition.

# RESPONDENT'S

# BRIEF

Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

*Petitioner,*

v.

JOHN DOE AND JACK SMITH,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTIONS PRESENTED

1. Whether the Writ of Certiorari should be dismissed as improvidently granted on Petitioner's request for an exception to the "stay put" provision of the Education for All Handicapped Children Act ("EHA") as the issue was neither raised nor decided below.

2. Whether cases involving special education rights are capable of routinely evading review, and thus are not moot despite the students' completion of their education.

3. Whether this Court should create an exception to the "stay put" provision (20 U.S.C. § 1415(e)(3)) even though the exception sought would contravene the plain language of the provision and the Congressional purpose behind passage of the Act.

4. Whether the EHA requires a State to provide direct services to a handicapped child when a local school district is unwilling to provide for the education of the child.

5. Whether under the circumstances it was an abuse of discretion for the lower court to order the State to provide direct services in view of the systemwide and statewide violations of the EHA found below.

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## STATEMENT OF THE CASE

This case concerns two handicapped students who were disciplined for behavior which was a manifestation of their handicaps. They were excluded from school and received no educational services whatsoever until the District Court intervened. In addition to this denial of their right to a free appropriate education guaranteed by the Education for All Handicapped Children Act, they were also denied access to the procedural safeguards of that Act until the District Court acted.

### A. John Doe.

Plaintiff John Doe, at the time of the events at issue, was a seventeen year old student in the San Francisco Unified School District ("SFUSD"). John was declared eligible for special education services by the SFUSD in 1980 because of his multihandicaps: "Neurological deficit, slow learner, significant emotional problems, small left hemiparesis due to congenital cerebral malformation." (JA 15)[1]

His April 1980 Individualized Education Program ("IEP") describes him as:

> Very depressed . . . If peers are aggressive towards him, he will respond aggressively. Social skills have deteriorated . . . Immature . . . Explosive . . . [He] can get into difficulty by becoming a scapegoat if he is not in a closely structured environment. He invites ridicule. He does not know how to relate to peers . . . Needs a lot of attention, in a small group, with individualized attention in a small school setting . . . Impulse control and control of anger a problem. (JA 16-17)

John's physical abnormalities—an overly large head and "very oddly shaped" teeth (JA 23)—contributed to his emotional problems:

---

[1] References to the Joint Appendix are abbreviated "JA" followed by the number of the referenced page(s). Citations to the Clerk's Record on Appeal are abbreviated "CR" followed by the docket sheet number of the referenced item. The Education for All Handicapped Children Act, 20 U.S.c. § 1400 *et seq. as amended*, is abbreviated "EHA" or "Act." The Brief for Petitioner herein is cited as "Brief." Emphasis in all quotations has been added and citations have been omitted unless otherwise noted.

> [N]eighborhood children used to tease him and call him a "monster" because of his large head and malformed teeth. They also chased him and often beat him up, as a result of which [he] became often very angry at them, and later, when he entered school, feared going there. (JA 23)[2]

Pursuant to his Individualized Education Program ("IEP"), in Fall of 1980 John was a student at a special SFUSD school for handicapped students. (JA 198-99, ¶2, 7) The School District admitted the school was not appropriate to Doe's needs. (JA 61) On November 6, 1980, in response to being teased and otherwise provoked, John struck another student. On his way to the principal's office to be disciplined, he broke a school window. (JA 209) It was undisputed that this behavior resulted from John's handicapping conditions (JA 218); indeed it was predicted in his IEP. (JA 16) The school principal suspended John from school for five school days. (JA 199, ¶8) On November 14, 1980 the principal then referred John to SFUSD's Student Placement Committee ("SPC") for permanent expulsion and/or exclusion from all educational services of the SFUSD because of his handicap related misconduct. John and his mother were informed of the referral (JA 35-6), and John's suspension was extended pursuant to state law. He was not allowed to return to school. (JA 201, ¶22) John's suspension was continued indefinitely pending the expulsion hearing without prior notice or an opportunity to be heard (JA 207, ¶68), and without any hearing regarding the necessity of continuing his suspension. These actions were taken despite requests from John's counsel to apply EHA procedures, return him to school, and schedule a meaningful evaluation of his placement and behavior. That same day, November 14, 1980, the SPC decided to recommend exclusion/expulsion of John.

John, meanwhile, made a written request for initiation of the special education administrative process guaranteed by the EHA. (JA 61-2, ¶18) The next day (November 15th), John and his mother received a letter from the SPC that it would hold a

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[2] "Dr. Stone's impression was that [John] was a basically somewhat slow and ungainly child who reacted to teasing by other children by explosive outbursts of behavior." (JA 28)



hearing on November 25, 1980, to consider John's expulsion or exclusion. (JA 200, ¶19) The SPC is responsible for administering the regular discipline rules and is not a part of the special education administration of the SFUSD (JA 202, ¶32.) Receiving no response to his request from the School District for an EHA hearing, on November 2, 1980, John filed suit; and as a result the District Court issued a restraining order directing SFUSD to stop the expulsion hearing, to provide home teaching for John and to convene an IEP team to review his program and placement. (CR 11; JA 201, ¶21) Until the District Court intervened, John was denied access to his EHA procedural rights to challenge the proposed change of his placement through expulsion. Subsequent to the court's initial restraining order, Doe returned to class at Louise Lombard School and, accompanied by a school aide, finished the school year without incident.

SFUSD provided no educational services to John from the November 6, 1980 incident until the District Court's temporary restraining order was implemented on November 26, 1980 (JA 201, ¶22) Until so ordered, SFUSD neither allowed John to return to school nor provided nor offered any alternative educational program or services. (*Id.*) Pursuant to court order an IEP on Doe was conducted. Doe pursued this IEP through an administrative hearing to court review, where the District Court held that the placement proposed by SFUSD was not adequate and that placement in a private special education school with psychotherapy and related services was appropriate.

The procedures and policies followed by SFUSD in John's case were applied to all students of the District. (JA 200, ¶17) There was no procedure specifically tailored to address the situation of a special education student against whom disciplinary action was contemplated, despite the fact that SFUSD's disciplinary forms asked whether the child was enrolled in special education programs and under which handicapping conditions the child was classified. (*Id.*) Doe notified the State Department of Education that he was being wrongfully deprived of special education services and EHA procedural

rights just prior to seeking redress in the District Court. (CR 129) Yet the State Superintendent took no action in response. Indeed, at all relevant times the State Superintendent had not issued any policy statement or procedures to guide school districts in the discipline of handicapped students. (JA 257, ¶ 15)

**B. Jack Smith.**

Plaintiff Jack Smith, a victim of child abuse as an infant (JA 177) was identified as educationally handicapped by SFUSD by the time he was in the second grade in 1976. (JA 202, ¶ 39) The initial report noted that Jack had behavior disorders in that he had an "inability to control verbal or physical outburst" and "serious emotional disturbance." (*Id.*) His main response to instances of high stress was to act out through "verbal provoking." (JA 137) Subsequent reports reiterated this evaluation and identified "specific learning disabilities" as well.

The 1978 and 1979 IEP's noted Jack was hyperactive and distractable with poor peer relationships. (JA 203, ¶s 42-43) The IEP's specified he needed a structured learning environment with "one-to-one attention" and "constant monitoring." (*Id.*) In September 1979 Jack began classes at a regular SFUSD middle school. In February 1980 an IEP meeting was held for Jack. He was again identified as a learning-disabled student. A program of special Learning Disability Group instruction combined with the regular program science class and regular non-academic programs (gym, lunch, etc.) was recommended. (JA 203-204 ¶ 45.) In the Behavior/Social Adaptation section the IEP stated Jack "wants to succeed, will take responsibility for completing tasks (homework); can be very courteous, warm and friendly; seeks attention from adults and peers much of the time; highly distractable, impulsively takes things; high anxiety, low self-esteem." (*Id.*)

Starting in September 1980 Jack was assigned a full-day program with certain learning-disabled group special education classes. (JA 204, ¶ 46) Jack's program was reduced to a half-day on October 14, 1980, for "behavioral problems." (JA 204, ¶ 47) Jack's schooling ended then each day before lunch at 12:30



p.m. (*Id.*) No other services were provided. Despite the recognition and consensus of school administrative opinion that "[Jack] acts impulsively [and] [h]e really doesn't plan to do the things he does," (JA 1490) on November 4, 1980, school officials informed Jack and his grandparents that any further disturbances on his part would result in his suspension from school and referral to the Student Placement Committee. (JA 204, ¶ 49) On November 14, 1980, Jack was suspended for five days for "disrupting school activities." (JA 205, ¶ 50) Jack's conduct was not violent to himself or others but consisted of making "sexual comments" to other students. (*Doe* v. *Maher*, 793 F.2d 1470, 1477 (9th Cir. 1986); JA 150).

On November 17, 1980, Jack was referred to the SPC. (JA 205, ¶ 51) Jack's suspension was continued indefinitely without prior notice or an opportunity to be heard. (JA 207, ¶ 68) As with Doe, there was no hearing regarding the necessity to extend this suspension. On November 21, 1980, the SPC notified Smith's grandparents by letter of its recommendation that he be totally excluded from school and that a hearing on this recommendation would be held on December 2, 1980. (JA 205, ¶ 54) On November 28, 1980, 4 days after Doe's complaint was filed, counsel became involved on Jack's behalf and objected in writing to the procedures being used. (*Id.*, ¶ 55) A copy of this letter was sent to the State Superintendent who again took no action. (JA 171-72) The SPC hearing was cancelled. (JA 206, ¶ 56) Later, school officials offered Jack either a half-day program at school or home teaching. (*Id.* ¶ 57) Since the School District would not restore Jack to his full educational program, Jack's grandparents elected home teaching. (*Id.*)

From November 14, 1980, to December 10, 1980, Jack received no educational services from SFUSD. (*Id.* ¶'s 58-60) No alternative program was offered or provided. (*Id.* ¶ 60) Beginning December 10, 1980, Jack received one hour or home instruction each day. On March 25, 1981, Jack Smith filed a complaint-in-intervention and subsequently intervened as a plaintiff in the instant case. (JA 91) Eventually, an IEP was conducted for Smith and resulted in a publicly funded placement in a private special education school.

### C. The District Court Proceedings.

Doe and Smith each sought damages and injunctive and declaratory relief from two categories of defendants: local school officials and the California State Superintendent of Public Instruction. Plaintiffs' motion for partial summary judgment was granted on June 17, 1983, against the SFUSD defendants. (JA 217) On July 13, 1983, the SFUSD defendants agreed to a stipulated judgment requiring them to pay $1600 to each plaintiff for the days of schooling lost by the boys. (JA 236) On October 24, 1983, the District Court issued a declaration and permanent injunction with respect to the local school district defendants. (CR 272) On April 23, 1984, the District Court also issued a decision granting declaratory and injunctive relief against the State Superintendent. (JA 244) In it, the District Court outlined the duties of the State Superintendent of Public Instruction with respect to the discipline of handicapped children. The court ruled *inter alia* that:

> 1. Where misconduct by a handicapped child is a manifestation of his handicaps he cannot be disciplined beyond the statutorily authorized suspension, expelled or totally deprived of educational services;
>
> 2. Before any significant changes are made in a child's educational placement or program or the services provided to him, the child shall have the right to a "comprehensive evaluation";
>
> 3. Whenever a change of placement or program is recommended as a result of a child's misconduct, the child shall have a right to have a multidisciplinary team convened within five school days of the initiation of disciplinary action;
>
> 4. The child has the right to remain in his current placement pending all EHA procedures, including all administrative and judicial reviews;
>
> 5. A handicapped child who misbehaves may be suspended for no more than five consecutive days;
>
> 6. Decisions of the IEP team shall be reached by a majority decision;
>
> 7. The state must provide services directly when in any individual case a local educational agency is unable or unwilling to establish and maintain such programs or services.



### D. The Ninth Circuit Opinion.

The local school district appealed from the December 2, 1983, declaratory judgment and injunction against it. The State defendant, Petitioner here, appealed from the April 23, 1984, judgment and injunction, and the plaintiffs filed a cross appeal from a District Court order of May 24, 1984. The appeals were consolidated in the Ninth Circuit.

Neither Petitioner nor the SFUSD defendants appealed from the granting of injunctive relief *per se*. Rather, the appeals of each were limited to specific aspects of the relief ordered which were challenged as unwise or inconsistent with the EHA. No one disputed or appealed the ruling of the District Court barring school officials from excluding or expelling handicapped students for conduct that is a manifestation of a child's handicapping condition. So too, no one appealed the preliminary injunction that returned Doe to school.

The Ninth Circuit, in an opinion written by Judge Sneed, upheld the District Court ruling that a comprehensive evaluation must be made before a significant change is made in the handicapped child's placement, program or services. The Court disagreed that decisions for the IEP team have to be by a majority, and held rather that they should be reached by "consensus."

With respect to the two issues on which certiorari has been granted;

The Ninth Circuit held that interim suspensions of fixed duration do not rise to the level of "changes of placement" and thus do not conflict with the "stay put" provision of 20 U.S.C. § 1415(e)(3). 793 F.2d at 1484-85. (At the time of the District Court decision California had no statutes authorizing suspensions of fixed duration in excess of five days. *Id.* at 1484.) Indulging "in a bit of dicta . . ." (*Id.* at 1484), the Ninth Circuit approved twenty and thirty day suspensions authorized by California Education Code §§ 48912, 48903 (Deering Supp.

1986), enacted only days before the argument of the appeal. However, it struck down unilateral, indefinite suspensions such as those authorized by the recently enacted Cal.Educ.Code § 48915.5(g) (Deerring Supp. 1986). The latter provision authorized indefinite suspensions pending completion of administrative and court review when parents exercise their federally-granted EHA "due process rights." 793 F.2d at 1485. In its discussion regarding Section 48915.5(g), the court concluded that the indefinite suspension authorized there would rise to the level of a "change of placement" and thus conflict with the "stay put" provision of 20 U.S.C. § 1415(e)(3). *Id.* The Ninth Circuit went on to say that where suspension rose to the level of a "change in placement" there are no additional exceptions to the "automatic injunction" of Section 1415(e)(3) beyond the statutory exception of parental consent and judicial relief on a case-by-case basis under § 1415(e)(2). *Id.* at 1486.

On the second issue accepted for review, the Ninth Circuit held that the State has a responsibility under 20 U.S.C. § 1414(d) to provide services directly, even in an individual case, whenever the State determines that a local educational agency is unable or unwilling to maintain a program of free appropriate public education for a handicapped child. *Doe* v. *Maher, supra*, 793 F.2d at 1491-92. Its ruling was constrained so that the State is *not* obliged to intervene directly in every individual case whenever the local agency falters, or "falls short of its responsibilities in some small regard." *Id.* at 1492. Rather, the court limited the State's direct service obligation under Section 1414(d) to "significant" breaches of the Act. *Id.* The court required three pre-conditions for the direct service obligation: that (1) the breach is significant; (2) the child's parents or guardian give responsible state officials adequate notice of the local agency's non-compliance; and (3) the State is afforded a reasonable opportunity to try to compel local compliance. *Id.*

## SUMMARY OF ARGUMENT

Congress enacted the EHA in 1975 because of its concern that "one million of the handicapped children in the United



States [were] excluded entirely from the public school system and will not go through the educational process with their peers" and that more than half of the eight million handicapped children in the nation were not receiving appropriate education. 20 U.S.C. § 1400(b). Now, twelve years later, Petitioner asks the Court to create an exception to the EHA which would effectively exclude millions of handicapped students again. Petitioner seeks this exception to the "stay put" provision, 20 U.S.C. § 1415(e)(3), without having ever requested it below. In fact, before the Ninth Circuit, Petitioner averred that he had "no quarrel" with this statutory provision. The statute is crystal clear and indeed is difficult to quarrel with. The Act unequivocally states the one and only exception allowed to the rule that the handicapped child continues his education until the dispute is resolved. The exception is that parents and educators may *agree* to change a student's placement, an exception wholly consistent with the theme and purpose of the EHA. The EHA establishes that handicapped children are entitled to an appropriate education, and that a means of insuring that right is by involving them and their parents throughout the process which designs their program and services. This is a *co-operative* process, which is ruptured when school officials attempt to change a student's placement unilaterally. The statute does not seek to interfere with the local school district's authority to educate its students, but only requires that procedural safeguards are in place to protect against discriminatory exclusions and stigmatizing of handicapped children.

Admittedly, many of these children are difficult to manage, disruptive and even sometimes violent. Often their disruptive behavior is the very hallmark of their handicaps. However, the Act provides ways to address such behavior without excluding the child. First, schools may use their normal procedure for immediate short-term suspensions to deal with out-of-control students. Second, the school officials may offer additional corrective and supportive services to modify the behavior. Third, they can offer an alternative program which the parent agrees is appropriate. Fourth, in the extreme case where no lesser measure is effective, the statute allows school officials to petition the courts for immediate judicial relief.

Petitioner has given no good reason why these alternatives are not adequate to protect the interests of school officials and handicapped students alike. There are, however, good reasons why no exceptions should be created in this case:

1. A ruling on this question would be an advisory opinion regarding an issue that was never raised in this case.

2. Congress expressed its intent clearly, and created in the plain language of the Act the sole exception which serves both parents and educators.

3. There are less restrictive alternatives available under the statute to address dangerous or disruptive behavior.

4. Judicial relief is appropriate and available under the authority of the Act in extreme cases.

5. A decision allowing a dangerousness exception will raise serious questions of conflict with this Court's decision in *Goss* v. *Lopez*, 419 U.S. 565 (1975).

To further its purpose of ensuring that handicapped children will receive a free and appropriate education, Congress also mandated in the EHA that if a local agency is unable or unwilling to provide this education to a handicapped child, the state educational agency must. 20 U.S.C. § 1414(d). The Ninth Circuit soundly affirmed the State's obligation, which the Petitioner now asks this Court to excuse. But the duty to provide services directly when an obdurate district will not is central to the statutory scheme. Congress was adamant that *one* agency be ultimately responsible for the education of *all* handicapped children within the state and charged that agency with supervising, monitoring and enforcing the provisions of the Act. It would, however, be a "hollow victory" for a handicapped child to be vindicated in his claim for education, but not to have received an education while the claim was being prosecuted.

## ARGUMENT

### A. The Writ Of Certiorari Should Be Dismissed As Improvidently Granted.

#### 1. Petitioner Seeks An Impermissible, Abstract Advisory Opinion On Issues Neither Raised Or Decided In, Nor Applicable To This Case.

From its earliest history this Court has steadfastly refused to issue impermissible advisory opinions or render decisions in



nonjusticiable circumstances not presenting a "case or controversy." *Muskrat* v. *United States*, 219 U.S. 346, 352-61 (1911) (discussing cases). This commendable and necessary caution applies as well where a nonjusticiable advisory opinion is sought in a matter of federal statutory construction. *E.g.*, *United States* v. *Fruehauf*, 365 U.S. 146 (1961). Petitioner would have this Court render such an impermissible advisory opinion with respect to the question of the construction of the "stay put" provisions of 20 U.S.C. § 1415(e)(3) and whether this Court should craft a judge-made exception to that section in instances where a handicapped child is considered by school officials to be disruptive or dangerous.

A ruling here would be a nonjusticiable advisory opinion because the exception urged by Petitioner was neither raised nor decided below, nor is it applicable to this case. The SFUSD never purported to expel or exclude either Doe or Smith because of an application of a dangerousness exception to 20 U.S.C. § 1415(e)(3). The District Court found as a fact that the SFUSD was relying on the regular education expulsion statutes and not purporting to act under any emergency exception to the EHA "due process" procedures. Indeed, the trial court specifically concluded the dangerousness emergency exception urged in this Court was *not present* in the case. (JA 222) ("Regardless of the extent of the emergency authority retained by defendants, in the instant case they did not act pursuant to that authority, and cannot now justify their actions on that basis.") In addition, the court found as fact that the school authorities had also never made the preliminary finding of dangerousness necessary to continue Doe's and Smith's suspensions. (JA 223) ("In this case, the defendants made no such finding and at least for Smith, who had no history of violence, could not have.") These fact findings were never challenged below and are binding on this Court unless clearly erroneous, which they are not. *E.g.*, *Guzman* v. *Pichirilo*, 369 U.S. 698 (1962). Thus, the trial court never considered whether any exception to § 1415(e)(3) for dangerousness should be created, and there is no record regarding the factual background that would inform this issue of statutory construction.

Even were the Court to create an exception for dangerousness, the exception would have no impact on the

Respondents. Smith did not engage in any violent behavior and his case presents no basis for creating or applying such an exception. (JA 223) The expulsion/exclusion proceedings against both Doe and Smith were not taken in furtherance of an exception to the stay-put provision, and the existence of such an exception would not change their right to injunctive relief. Rather, they were indefinitely suspended pending formal expulsion proceedings under the statutes regulating discipline of non-handicapped students. In fact the District Court observed that SFUSD had violated the regular discipline statutes by failing to have a hearing on continued dangerousness prior to extending Respondents' suspensions. (JA 64)

Furthermore, there is no basis for considering the proposed exception in connection with the proper scope of injunctive relief because the exception was never raised until the petition for certiorari. The issue was never briefed or argued in the trial court or in the Court of Appeals. As noted above, the trial court determination that the dangerousness rationale was not present was never disputed or challenged on appeal. The issue was interjected in the case via the *dicta* of the Ninth Circuit in that court's advisory opinion about the newly enacted California legislation and via the subsequent petition for certiorari.

Respondents submit it is unwise to adjudicate the proposed exception in the context of this case. The record is undeveloped. *See Rescue Army* v. *Municipal Court*, 331 U.S. 549 (1947). The trial court never considered the question. The facts regarding respondents and their situation are irrelevant to a dangerousness exception. Important factual development is nonexistent. There is no evidence of the nature and characteristics of the handicapped student population and their tendencies and proclivities. There is no evidence of the frequency of similar situations, of the time periods involved or of the alternatives that may be available in particular cases or classes of cases. There is no evidence of the unworkability of the existing parental consent and judicial exceptions. Instead, all there is is inflated rhetoric and "horrible hypotheticals" by Petitioner and amici which urge a rule founded on the assumption that handicapped children are time bombs waiting to explode.



Moreover, Petitioner and his supporting amici cannot seem to even agree on what the issue is; each has a different formulation of the question.[3] In sum, the instant case is precisely the type of case where the wisdom of the restraint on advisory opinions will assure a more informed decision. Dismissal of the writ is appropriate. *McCarthy* v. *Bruner*, 323 U.S. 673 (1944) (issue found not to be presented by the record); *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968) (record not "sufficently clear and specific to permit decision of the important . . . questions involved in this case.").

Although the case is technically moot because both Doe and Smith no longer attend public school, Respondents submit the case should not be moot for review by this Court with respect to the question of the State's obligation to provide services directly. The permanent injunction continues to be operative and the conduct enjoined is likely to recur without it. *Cf. Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968) ("underlying question persists"). The gravamen of the injury was not actions taken individually

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[3] Petitioner argues for an exception that would authorize a unilateral and indefinite change of placement pending EHA proceedings for a "disruptive" child. The Solicitor General seeks "indefinite suspensions" for children whose handicap-related behaviors pose a tangible threat to other persons. The National School Safety Center and associated agencies ask to "immediately suspend or expel" handicapped students, whether or not their behavior is a manifestation of their handicaps, if the child is a danger to him- or herself or others. The joint California school districts argue that the EHA provisions should not apply *at all*, and that school districts be allowed to suspend or exclude all students who are "dangerous or disruptive" to a safe school environment or to *property*. The National School Boards Association suggests that school officials should be able to "remove indefinitively" any "seriously emotionally disturbed" or "mentally retarded" child who is "by definition" a "hazard" to him- or herself or others, or is disruptive of the educational process. The San Francisco Unified School District questions whether a district can "temporarily transfer" a handicapped student who is a "danger," regardless of whether the behavior is a manifestation of the handicap or not, for a short but unspecified time pending injunctive relief.
Since each of the groups above seems to come to the Court with a differer.. view of the exception presented, it becomes apparent that the instant case is not in a posture for proper review by this Court. In fact, this lack of unanimity establishes that application of a decision by the Court would be impossible.

against these two respondents, but the routine practice of school officials to deny handicapped children their due process rights and the absence of state policy and monitoring to correct this practice. The declaratory relief obtained, particularly as directed to the State Superintendent, was of equal, if not paramount, importance in this case. See *Sherry* v. *New York State Education Dept.*, 479 F.Supp. 1328, 1334-35 (W.D.N.Y. 1979). Furthermore, as this Court has recognized, the EHA "review process is ponderous" and "takes years to run its course—years critical to the child's development . . ." *School Committee of Burlington* v. *Department of Educ.*, 471 U.S. 359, 361, 370 (1985). Thus EHA claims are necessarily "capable of repetition, yet evading review" (*Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982)) on a consistent basis by virtue of the interaction of the limited years of education and the lengthy process of administrative and judicial review of EHA issues. This case represents an appropriate exception from the normal result in the education context. *E.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Pasadena Board of Educ.* v. *Spangler*, 427 U.S. 424, 430 (1976); *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 130 (1975). Otherwise a body of cases will develop which establishes that given the nature of review in EHA cases, handicapped students cannot obtain review of infringements upon their rights under the EHA unless they are able to afford and allege a class action in every situation.

**2. Petitioner Has Waived Consideration Of A Dangerousness Exception.**

This Court has also declined to address issues raised for the first time in a petition for certiorari. *E.g.*, *City of Springfield* v. *Kibbe*, ___ U.S. ___, 107 S.Ct. 1114 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts"); *accord Youakim* v. *Miller*, 425 U.S. 231, 234 (1976), *California* v. *Taylor*, 353 U.S. 553, 556 n. 1 (1957). While not jurisdictional, the rule is based on sound jurisprudential and administrative concerns, so much so that the Court will entertain new issues "only in exceptional cases." *Youakim*, *supra*, 425 U.S. at 234 (*citing Duignan* v. *United States*, 274 U.S. 195 (1927)).



As stated above, the claim of authority to suspend indefinitely based on dangerousness was never adjudicated. It was not raised by either the Superintendent or the SFUSD. The return of plaintiffs, via court order, to their placements and the subsequent injunctive provisions requiring observance of the "stay put" provisions were never claimed to be contrary to the statute by any party.[4] Indeed, in its brief on appeal to the Ninth Circuit Petitioner stated:

> Such requirements are already in the statute, 20 U.S.C. § 1415(e)(3), and we have no quarrel with them. Appellant's Brief, *supra*, at p. 16.

Therefore, the Ninth Circuit did not rule on the question but suggested *in dicta* that a unilateral and unlimited suspension was not proper and that the statute required parental consent or a court order to change a student's placement. 793 F.2d at 1484-86. Petitioner raised this issue for the first time in his petition for certiorari and must be deemed to have waived it.

Nor are there any reasons to treat this case as exceptional. It is a garden variety case regarding disciplinary exclusion of handicapped children where the factual basis for the new issue is found not to exist, where petitioner did not appeal the issue and where the appellate court unfortunately stated overbroad *dicta*. At most only a remand to the trial court for consideration of this question should be considered. *Cf. Youakim* v. *Miller*, *supra*.

**B. Petitioner Seeks To Have The Court Create An Exception To The "Stay Put" Provisions Contrary To The Act's Language, Purpose And Genesis.**

**1. The Act's Plain Language Requires All Children Remain In Their Current Placement Pending Resolution Of Disputes.**

In the text of the section in issue, Congress spoke with uncharacteristic clarity:

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[4] See [State Superintendent of Public Instruction] Appellant's Brief, dated December 6, 1984, page 1, "Issues Presented."

> During the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child *shall* remain in the then current educational placement of such child . . . until all such proceedings have been completed.

20 U.S.C. § 1415(e)(3).

As this Court observed when first reviewing the EHA, the Court's task is to give full effect to the statute as enacted:

> [O]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add or to subtract, neither to delete or to distort. We would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the act. . . .

*Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11 (1982).

When Congress uses mandatory and unambiguous language, its directives are not discretionary but must be given effect. The ordinary language must be presumed to be intended unless it would manifestly defeat the object of the provisions. *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 359 (1895); *Escoe* v. *Zerbst*, 295 U.S. 490, 493, 494 (1935) ("shall" is the "language of command" which will be construed as mandatory in meaning if to do otherwise would seriously impair the public or private interests intended to be protected). As discussed in detail below at pp. 20 to 21, the Congressional purpose of ensuring a free and appropriate education for *all* handicapped children clearly requires that mandatory meaning be given to the word "shall" in Section 1415(e)(3).

The only exception to the stay-put provision is the parental agreement exception expressly stated in § 1415(e)(3) which is consonant with the "*Modus operandi* in the Act . . . [The] 'individualized educational program.'" *Burlington*, *supra*, at 368. Parental participation in the development of the IEP and assessment of its effectiveness is emphasized throughout the Act. See 20 U.S.C. §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A),



(C), (D), (E), 1415(b)(2); 34 C.F.R. §§ 300.345, 300.504, Pt. 300, App. C 80-83 (7/1/86 ed.). Although cooperation between the agency and the parents is encouraged, the process does not always result in agreement. This Court has observed:

> Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labelled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements.
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> * * * *
>
> [We] think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see *e.g.* § 1415(a)-(d), as it did upon the measurement of the resulting IEP. . . ."

*Rowley, supra*, at pp. 205-206.

Thus, the procedural safeguards in § 1415 keep the parents involved in the decision-making processes of the Act and provide the only exception to the stay-put provision.[5] Specifically, § 1415(e)(3) guarantees parental participation in the placement decision because it allows only one of two placements to be given effect: either the placement of the current

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[5] The procedural safeguards of § 1415 specifically intended for handicapped children and their parents were introduced by Senator Stafford as amendments to the EHA in 1974, Pub. L. No. 93-380, 88 Stat. 599 (S-1539) *reprinted in* 1974 U.S. Code Cong. & Adm. News, 656, 659. While the "stay-put" provision was not included until the following year, the requirment of "prior notice . . . whenever the local or state agency proposes to change the educational placement of the child" *ibid*, certainly suggests that parents should be involved *before* the child is moved, not simply provided a hearing later. Senator Stafford expressed Congress' intent to be sure "that parents, and where appropriate the children themselves, have the right to participation when crucial educational decisions affecting their entire lives are made." 120 Cong. Rec. 15272 (daily ed. May 20, 1974).

IEP to which the parents had consented previously or a new interim placement to which the parents agree.[6] The exception to § 1415(e)(3) for "disruptive" children urged by Petitioner would sanction unilateral placement decisions by the educational agency over the objection of the students' parents.[7] Such

[6] Amicus Davis Unified School District *et al.*, makes the specious argument that expulsion is not a change of placement, in contrast to *S-1* v. *Turlington*, 635 F.2d 342, (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Kaelin* v. *Grubbs*, 682 F.2d 595 (6th Cir. 1982), and *School Bd.* v. *Malone*, 762 F.2d 1210 (4th Cir. 1985), and therefore the due process procedures of § 1415, which are limited in application to changes in placement, need not be respected. A return to the clear language of the Act, however, shows that Congress provided these procedural safeguards to give handicapped children and their parents:

> (E) An opportunity to present complaints with respect to *any matter relating to* the identification, evaluation, or educational placement of the child, *or the provision of a free appropriate public education to such child*. 20 U.S.C. § 1415(b)(1)(E). . . .

*Rowley, supra*, 458 U.S. at 182. See also 34 C.F.R. §§ 300.504, 300.506 (parents' right "to contest *any decision* made concerning the educational placement . . .").

The argument that when a student is expelled, he or she goes from "a placement" to "no placement," and therefore has not undergone a "*change*" from one program to another, dramatically illustrates the contortions which educational agencies will attempt in order to escape the procedural requirements of the EHA. There is need for this Court to rule finally and definitively that expulsion, regardless of the guise under which it comes, *is* a change of placement which can only be effected in accordance with the specific procedures of 20 U.S.C. § 1415.

Notably, Petitioner himself concedes that most disciplinary actions will result in a change of placement. He argues instead that unilateral changes of a "disruptive" child should be exempt from the due process requirements (Brief, p. 12, note 17.)

[7] Although the question posed for review concerns a handicapped child whose behavior is dangerous to him or herself or others, Petitioner consistently asks the Court to create an exception for "disruptive" children (Brief, p. 8, n. 12). Nowhere does he suggest that there be a finding of dangerousness, nor even that there be cause to believe the child may act out again. Indeed, Petitioner argues that the child's "mere presence" creates an unstable atmosphere. Various amici in support of Petitioner have been more precise about the kind of behavior sought to be exempted from the stay-put provision, and we expect that the Court will be most concerned about those hypothetical situations in which a handicapped child continued to pose a



an exception would negate a major component of the EHA; therefore, it would be contrary to all standards of legislative analysis for this Court to read such an exception into the Act. Petitioner and those amici supporting him ignore the exception in the statute and adopt the unrealistic assumption that parents of a handicapped child who is exhibiting explosive and unacceptable behavior will fight for years to allow their child to continue this behavior unbridled and without correction, thereby sacrificing months and years of education for the sole purpose of maintaining their child in an inappropriate, and often hostile, environment. Congress thought otherwise and encouraged parents and the educational agencies to agree on an interim placement when lengthy review to resolve differences seemed likely.

If the return of a student to the current placement pending due process procedures is manifestly unwise, the local education agency should offer a reasonable alternative. In most cases a parent will be grateful for the administrator's attempts to address the problems and to get the child's situation sufficiently under control to allow education to continue. However, if the school district's offer is for no services whatsoever (as it was when Doe was excluded from school) or for one hour of tutoring once or twice a week (as it was when Doe filed his motion for preliminary injunction compelling his return to school) then the local education agency must be legally required to return him to his "then current educational placement." 20 U.S.C. § 1415(e)(3).

Congress carefully considered the situation of handicapped students and of their educators and allowed an exception to the "stay-put" requirement to cover those situations where a parent and the educators *agree* that a change in placement is in the best interest of the child. This exception is consonant with the requirement of parental participation followed throughout the

threat of danger to himself or others. Thus, we have characterized Petitioner's argument as seeking a "dangerous child exception," suggesting to the Court that to expand the decision to address discipline of a "disruptive" child would likely, at one time or another, apply it to every child in the country, handicapped or not.

Act. Petitioner's proposed exception is not. In view of the explicit exception in § 1415(e)(3), it is extremely unlikely that Congress intended an additional exception regarding "dangerous" children that would undermine the very exception set out in the statute. Finally, the fact that Congress *omitted* from § 1415(e)(3) a provision in the decree in *Mills* v. *Board of Educ.*, 348 F.Supp. 866 (D.D.C. 1972), a case prompting passage of the EHA, which allowed a principal to change the placement of a child he believed to be a danger to himself or others, argues strongly that Congress considered *and specifically rejected* a dangerousness exception such as that urged here.

**2. Congress' Purpose In Enacting The EHA Was To Provide Education To Handicapped Children And To Prevent Their Unilateral Removal From School.**

The Act itself states the statutory purpose:

> It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected. . . .

20 U.S.C. § 1400(c).

This Court reviewed the purposes and intent of the EHA in *Rowley, supra*. There, the Court affirmed that the primary purpose of the EHA is to assure access to educational opportunity for all handicapped children, and to require procedures to insure individualized planning and review of a handicapped child's program:

> When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.

*Rowley, supra*, at 189 (emphasis in original).[8]

[8] This case does not present any issue of infringement on State and local control over educational methods or the formulation of educational programs. See *Rowley, supra*, at 207-208. Instead it concerns only whether "the State complied with the procedures set forth in the Act." *Id.* at 206.



These two concepts—*access* and "*due process*" *procedures*—are at the very core of the present case. The school district and the State educational agency here excluded Responsdents without providing the prescribed procedures, and still today seek the Court's authorization for unilateral exclusion of handicapped children from their assigned classes without the procedural safeguard of § 1415(e)(3).

Looking specifically at that section, this Court has held:

> We think at least one purpose of § 1415(e)(3) was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings. . . .

*Burlington, supra*, at 372.

Since the purpose of the Act is to provide handicapped children with an education and to ensure their due process rights, then the requirement that the child remain in his or her educational placement while the due process procedures are going on must be given its intended mandatory effect.[9]

**3. The Legislative History Confirms That Congress Intended "Disruptive" Children To Be Fully Protected By The Act.**

The Senate and the House stated that passage of the EHA was prompted by the court decisions in *Pennsylvania Ass'n. For Retarded Children* v. *Pennsylvania*, 343 F.Supp. 279 (E.D.Pa 1972) (hereinafter "*P.A.R.C.*") and *Mills* v. *Board of Educ.*, 348 F.Supp. 866 (D.D.C. 1972) (hereinafter "*Mills*") and the pendency of similar cases in a majority of the states. These cases recognized a Fourteenth Amendment right to public education for handicapped children.[10] The *Mills* and

[9] *See generally*, Paddock, *The Rights Of Handicapped Students In Disciplinary Proceedings By Public School Authorities*, 53 U.Colo. L.Rev. 367 (1981).

[10] The EHA rests in part on Congress' power to enforce the Fourteenth Amendment pursuant to § 5. S.Conf. Rep. No. 455, 94th Cong., 1st Sess. 28, 29, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1480, 1482 ("The Senate bill, not the House amendments, states that it is in the national interest that the Federal Government assist State and local efforts *in order to assure equal protection of the law.* The House recedes.") (Emphasis in original); See *Rowley, supra*, at 200 (Act "provide[s] a 'basic floor of opportunity' consistent with equal protection . . ."); *David D.* v. *Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1790 (1986).

*P.A.R.C.* decisions held such children had "the right to free publicly supported education . . . ." S. Rep. No. 168, 94th Cong., 1st Sess. 6 (1975).

> The fact that both *P.A.R.C.* and *Mills* are discussed at length in the legislative reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act.

*Rowley, supra*, at 194.

In both cases, the use of disciplinary exclusion and expulsion for hard-to-handle children was considered and found unlawful.[11] *Mills* concerned seven children,

> "[who] have been labeled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive, and [were] denied admission to the public schools *or excluded therefrom after admission* with no provision of alternative educational placement or periodic review."

*Mills, supra*, at 868. *Four* of the seven had been excluded from their current school programs for "behavorial problems." *Id.* at 869. As a result of their complaint, the court ordered defendant educational agencies to identify every child "known not to be attending a publicly-supported educational program because of *suspension, expulsion*, or any other denial of placement." *Id.* at 871. It further enjoined:

> Defendants shall not, on grounds of discipline, cause the exclusion, suspension, expulsion, postponement, inter-school transfer or any other denial or access to regular instruction in the public schools to any child for more than two days.

*Id.* at 880.

Congress' specific intent to include children who might be "disruptive," potentially threatening or dangerous, repulsive

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[11] The importance to Congress of these rulings regarding exclusion of students with behavioral problems has been recognized by this Court:

> [T]he impetus for the Act came from two federal court decisions, *Pennsylvania Assn. for Retarded Children* v. *Commonwealth* and *Mills* v. *Board of Education of District of Columbia*, which arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from the public schools." *Burlington, supra*, at 373.



or aggressive is further evidenced by other provisions of the EHA. For example, Congress specifically included in the statutory definition of handicapped children those who would be classified "seriously emotionally disturbed" (hereinafter "SED"), 20 U.S.C. § 1401(1).[12]

Moreover, Congress *prioritized* the children who must receive services to serve first those who were *unserved* (the largest number of whom were the learning disabled and the emotionally disturbed), and then those who were being inadequately served who have "the most severe handicaps." 20 U.S.C. § 1412(3).[13] Additionally, Congress emphasized the necessity of serving *all* handicapped children with the requirement that state and local educational agencies identify and serve "all children . . . who are handicapped, *regardless of the severity of their handicap*," 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A). The conclusion should be clear when Section 1415(e)(3) is read in context with its history and the EHA as a whole: § 1415(e)(3) means exactly what it says on its face and

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[12] John Doe was not the first child who, as a result of his handicap, would strike out in violence when provoked. Indeed, the frustration and violence exhibited by handicapped children struggling to learn has been etched onto the nation's consciousness by the vivid portrayal of the young Helen Keller in "The Miracle Worker."

[13] Both the Senate and House accepted into the Record and repeatedly cited statistics presented by the Bureau of Education for the Handicapped that 82% of the children labeled "emotionally disturbed" were unserved—over one million of them—a percentage of unserved children exceeded only by those children classified as "learning disabled," Table I, Estimated Number of Handicapped Children Served and Unserved by Type of Handicap, S. Rep. No. 168, 94th Cong., 1st Sess. 8 (1975), H.R. Rep. No. 332, 94th Cong., 1st Sess. 12 (1975).

It is not, then, surprising that Petitioner seeks authorization to exclude Doe, who was classified as "seriously emotionally disturbed," and Smith who was classified as "learning disabled" with "serious emotional problems." Indeed statistics cited by amicus National School Boards Ass'n at pp. 5-7 of their brief—that there are presently one million seriously emotionally disturbed and retarded children—are offered for the proposition that these are "by definition" the only students for whom an exception is required. If this is allowed, we will have come full circle, effectively excluding over one million handicapped children again.

was intended to apply even against exclusions, explusions and other disciplinary attempts to remove disruptive handicapped children.

**4. School Officials Have Numerous Alternatives, Consistent With The Act, To Manage "Disruptive" Children.**

The EHA is a deliberate and carefully devised scheme in which Congress balanced the interest of school administrators, teachers, handicapped children and their parents. The stay-put provision does not bind the hands of the school officials or leave them powerless to maintain order in the classroom.[14]

First, it is clear from the Act that the school should consider whether adaptations to the handicapped child's program[15] or

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[14] The scope of discussion is limited in this case to remedies available to school officials under the EHA. Obviously, however, in extreme cases, such as the murder at Davis High School paraded in the amicus brief of the joint school districts, law enforcement and juvenile authorities will be involved. California has provisions to detain violent offenders before trial. Cal. Wel. & Inst. Code §§ 602 through 742. Additionally, California has a mental health system which provides for involuntary commitment of persons seriously out of control. Cal. Wel. & Inst. Code §§ 5150 through 5371. In the example given, the juvenile court judge refused to release the boy (Brief of Amicus, Davis Unified School District et al., Appendix A). Similarly, a student may be committed to a hospital for psychiatric evaluation and treatment. *E.g.*, *Jackson* v. *Franklin County Sch. Bd.*, 765 F.2d 535, 536 (5th Cir. 1985). In either case, the student no longer poses a problem to the classroom.

[15] 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.551(b)(2). Utilization of study carrels, time-outs, behavior-modification systems, detention, restriction of privileges and other innovative techniques have been successfully implemented in the classroom to conform behavior. It is also possible that a change of site, which does not alter the educational program prescribed for the child but which may reduce the pressures in a particular classroom, will be appropriate. See *Concerned Parents and Citizens for the Continuing Educ. at Malcolm X (P.S. 79)* v. *New York City Bd. of Educ.* 629 F.2d 751 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). While Petitioner and several amici suggest that all they seek here is permission to remove the child from his classroom, not one of them has drawn the distinction required by *Malcolm X;* that is, that there can be a change in the location of the classroom, but *not* in the substantive educational program being provided. See also, *Lunceford* v. *District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984). The case mistakenly cited by Petitioner and amici as supporting a dangerousness



the provision of "related services" may alleviate the problems. The expansive provision regarding related services includes specialized equipment, family counseling, psychological services, social work services, therapeutic recreation services, and medical and psychological evaluations. 20 U.S.C. § 1401 (17); 34 C.F.R. § 300.13. Related services have often addressed the problematic behaviors of handicapped students through the provision of supervisory classroom staff (*Sherry* v. *New York State Education Dept.*, 479 F.Supp. 1328 (W.D.N.Y. 1979)), individual psychotherapy (*Max M.* v. *Illinois State Bd. of Educ.*, 629 F.Supp. 1504 (N.D. Ill. 1986), and non-instructional summer recreational and work-training activities (*Birmingham and Lamphere Sch. Dists.* v. *Supt. of Pub. Instr.*, 120 Mich. App. 465, 328 N.W.2d 59 (Ct. App. Mich. 1982)). *See Irving Independent School District* v. *Tatro*, 468 U.S. 883, 891 (1984) ("A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned.") In emergency situations, and for correcting inappropriate behavior, suspension remains available to the school administrators. *Goss* v. *Lopez*, 419 U.S. 565, 580 (1975). In fact, a five-day suspension of a handicapped student was specifically held here *not* to be a change of placement necessitating due process procedures. *Doe*, *supra*, 793 F.2d at 1485.

As is shown by administrative interpretation of Section 1415(e)(3), the Department of Education has construed § 1415(e)(3) consistent with its plain language and legislative background in a Comment to its Regulations. The Comment advises that the requirement:

> [D]oes not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

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exception to § 1415(e)(3) in fact involved a "*Malcolm X*" transfer of the student from one school to another; "there was no evidence that the proposed placement was in any way inappropriate . . ." *Victoria L.* v. *District School Bd.*, 741 F.2d 369, 374 (11th Cir. 1984.)

34 C.F.R. § 300.513 Comment.

The Ninth Circuit and others have interpreted the Comment to mean that a school may suspend a disruptive handicapped student for short-term fixed suspensions authorized under state law that satisfy the strictures of *Goss* v. *Lopez*, *supra*.[16]

Suspensions of more than 10 days, however, have been determined to constitute a change in placement under the EHA. The Office of Special Education Programs of the U.S. Department of Education has adopted a finding by its Office of Civil Rights that "a Suspension or explusion of more than ten days' duration constitutes a change in placement which would trigger the procedures and protections of Part B of the Education of the Handicapped Act," thus calling into question the holding of the Ninth Circuit in this case that suspensions of 20 or 30 school days are not a change in placement or a loss of a free appropriate public education within the meaning of EHA. U.S. Dept. of Educ. OCR, Letter of Finding (MOKERLY), October 16, 1980, Educ. for the Handicapped L. Rep. 257:203-204; U.S. Dept. of Educ. OCR, Letter of Finding—(RHYS) April 15, 1985, Educ for the Handicapped L. Rep. 254:26-28; U.S. Dept. of Educ. OSEP, Policy Letter (FIELDS) February 26, 1987, Educ. for the Handicapped L. Rep. 211:437. Substantial deference is due

[16] To reverse the Ninth Circuit decision here the Court would have to address at least four constitutional questions that need not be reached if Respondents' construction of 20 U.S.C. § 1415(e)(3) is upheld. First, the Court would have to rule that the newly enacted California statutory scheme is constitutional under *Goss*. Second, The Court would have to hold that the indefinite suspensions of Doe and Smith and the procedures as applied, including the lack of any meaningful prior hearing on the continuation of their suspensions, pass muster under *Goss*. Third, under the view urged by the Solicitor General, the imposition of an indefinite suspension without any predeprivation hearing in general would have to be upheld as constitutional on its face under *Goss*. Finally, the Solicitor General's position would also require a determination that conditioning a student's exercise of EHA "due process" review rights upon indefinite denial of his Fourteenth Amendment and statutory rights to a free appropriate public education was not an impermissible burdening of his right to "due process" review before federal administrative and judicial tribunals. See *Terral* v. *Burke Constr. Co.*, 257 U.S. 529 (1922); *United States* v. *Jackson*, 390 U.S. 570 (1968).



to the interpretations issued by these administrative agencies which are charged with monitoring and enforcing the EHA. *Chemical Mfrs. Asso.* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) ("view of the agency charged with administering the statute is entitled to considerable deference"); *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n. 3 (1981) ("regulations promulgated by the governmental body responsible for interpreting or administering a statute are entitled to considerable respect. . . .").

If *all* else fails, and there are no alternatives acceptable to the student's parent and no other means to establish order in the classroom, then the statute provides that the federal and state courts may grant "such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). School officials can petition the courts for an extraordinary order permitting them the necessary change of placement pending due process procedures. If a school district can show that attempted adaptations and related services have not eased the problem, that reasonable alternatives were rejected by the parents, and that the child continues to pose a serious threat in his placement, the scales of equity will certainly tip in favor of an injunction outweighing the stay-put provision. See *Jackson* v. *Franklin County Sch. Bd.*, 765 F.2d 535 (5th Cir. 1985).[17] Contrary to the Solicitor General's argument, neither of the courts below interpreted § 1415(e)(3) as prohibiting the exercise of traditional equitable power of the courts to issue preliminary injunctive relief; what the courts said was that the authority to grant equitable exceptions to the stay-put provision belongs to the *courts* on a case-by-case basis, not the education officials unilaterally.

The concept of § 1415(e)(3) as an "automatic stay" which allegedly robs the courts of any discretion to issue equitable

[17] SFUSD amicus argues only that it will need more time to get an injunction, during which the school authorities should in effect share in the courts' inherent powers to issue injunctions. The Court is aware, however, these are, by their nature, extraordinary orders obtainable quickly in proceedings with which attorneys and courts are familiar. SFUSD can point to no other situation or to any precedent where a statutory exception authorizes unilateral implementation of relief subsequently sought from the courts.

orders and which the Solicitor General opposes so vociferously, has been reviewed and rejected by the First Circuit just as it was in the Ninth Circuit.

In *Doe* v. *Brookline*, 722 F.2d 910, 917 (1st Cir. 1983), the court reviewed a district court opinion which characterized § 1415(e)(3) as an "automatic stay preventing *any* change in the child's location and educational program *except by agreement of the parties.*" (Emphasis in original) Observing that by enacting the stay-put provision "Congress indicated that despite an ongoing IEP conflict, consistency in a disabled child's education is highly important," (*Id.* at 915), the court overruled the lower court's language "to the degree [it] can be read as construing (e)(3) to preempt judicial powers of equity," and confirmed rather that § 1415(e)(2) "is an express grant of authority to district courts to fashion all appropriate relief . . . [including] the power to issue preliminary relief in the appropriate exercise of discretion," *Id.* at 917.

Similarly, the Ninth Circuit in this case rejecting the indefinite suspension in the newly enacted Cal. Educ. Code § 48915.5(g) wrote:

> . . . We do not believe that Congress meant to allow school officials to avoid the EAHCA's "stay-put" provisions simply by making a *unilateral* determination that a child should be suspended indefinitely because he or she threatens to disrupt the educational process. This limitation does not leave educators helpless. They have recourse to the gamut of lesser disciplinary measures and program variations that do not rise to the level of changes in placement. Moreover, educational agencies may seek judicial relief should existing procedures prove inadequate to cope with truly exigent circumstances. . . .

*Doe, supra*, 793 F.2d at 1486.

A review of the preliminary injunction and permanent injunctions issued by the District Court (J.A. 63, 236, 244) here in fact shows that the court performed a "balancing of equities" in determining whether to enforce the provisions of § 1415(e)(3). What the Ninth Circuit held, as did the First Circuit, is that the *courts* can, in equity, issue orders which



override the statutory preference to maintain a placement, but that the local and state *educational officials* may not.[18]

Nevertheless, the Petitioner contends that it is too burdensome for education agencies to have to go to Court to get extraordinary relief. However, Congress itself expressed a preference for the *status quo* in Section 1415(e)(3) and placed the burden on school authorities to obtain extraordinary relief from the courts under Section 1415(e)(2).[19] Petitioner's argument should be addressed to Congress. It is misdirected to this Court and must be rejected.

### 5. The Court's *Burlington* Decision Does Not Create An Exception To The "Stay-Put" Provision.

Petitioner asserts that *Burlington, supra*, "represented one exception to 1415(e)(3)" and submits that "[t]his case . . . represents another." Brief, p. 13. Petitioner misreads *Burlington*. *Burlington* authorized tuition reimbursement as a remedy which may be ordered in the discretion of the Court under the broad authorization of 20 U.S.C. § 1415(e)(2) to "grant such relief as the Court determines is appropriate." *Burlington, supra*, at 369. The Town argued that the parents' violation of the stay-put provision should act as a waiver of their right to a remedy under § 1415(e)(2). This Court summarily rejected the argument, observing that the procedural safeguards of § 1415 were primarily intended for the benefit of the parents and the

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[18] "[W]e do not believe that Congress meant to allow *school officials* to avoid the EAHCA's 'stay put' provision simply by making a *unilateral* determination that a child should be suspended indefinitely because he or she threatens to disrupt the educational process," *Doe* v. *Maher, supra*, at 1486.

"We cannot conclude that Congress intended to restrict *courts* from modifying interim placement and program where the burden for preliminary relief is satisfied." *Doe* v. *Brookline, supra*, 722 F.2d at 918, *Accord, Stacy G.* v. *Pasadena Independ. School District*, 695 F.2d 949, 955 (5th Cir. 1983).

[19] *E.g.*, 121 Cong. Rec. H7764 (daily ed. July 29, 1975) (Rep. Miller) ("I believe the burden of proof . . . ought to rest with that administrator or teacher who seeks for one reason or another to remove a child from a normal classroom, to segregate him or her from non-handicapped children, to place him in a program of special education . . . ."); *cf. S-1* v. *Turlington, supra*, 635 F.2d 342 at 348-49.

child and that they should not be applied in such a way as to defeat the objectives of the Act. *Id.* at 373. The Court observed that when faced with the length of time which resolution of a dispute may consume and the on-going need of their child to receive services, "conscientious parents who have adequate means" would certainly choose to provide an appropriate program privately. *Id.* at 370. However, the Court warned that:

> parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local officials, do so at their own financial risk.

*Id.* at 373-74.

The Court did not *except* parents from the provisions of § 1415(e)(3). Rather, the Court determined that violations of § 1415(e)(3) could not bar parents from obtaining relief under § 1415(e)(2).

If this Court agrees with Petitioner that *Burlington* allows an exception to the stay-put provision for parents of means, and that the present case allows an exception for school administrators, it will unfairly establish that wealthy families whose handicapped children are wrongfully disciplined or excluded from their public programs have redress, but that for poor families, months and years of education vital to a handicapped child's preparation for adulthood are simply, irretrievably lost.

### 6. Petitioner Has Made An Insufficient Showing On Which To Base A Dangerousness Exception.

Petitioner's reasons for seeking this Court's permission to allow arbitrary changes in the student's programs are not valid. He gives four: (1) the student's behavior *ipso facto* establishes that the current placement is inappropriate; (2) even if the student's behavior is not volitional he cannot help but benefit from a more structured and closely supervised environment; (3) his conduct distracts and intimidates other students, and disrupts the order of the classroom;[20] and (4) that although

[20] While Petitioner is concerned about the chilling effect of Doe's behavior



there may be other ways to deal with the problem, they are administratively cumbersome and intrusive of the established routine of the school.

The fact that a handicapped student acts out in class does not show that his current placement should be changed. It is fully consistent with and indeed in most cases expected that a student will exhibit acting out behavior that is a manifestation of his or her handicapping condition. That a handicapped student acts like a handicapped student thus does not establish that the placement is inappropriate.[21] The EHA envisions that the IEP will address such acting out behavior and if successful will reduce the frequency or severity of the acting out behavior. The EHA does not expect that such behavior will necessarily be eliminated altogether.

Moreover, acting out behavior may also result from an appropriate IEP which is being improperly implemented. For example, services to be provided under the IEP may be ineffectively presented. Thus, the problem may be not with the student or the site but with the implementation of the program. Moreover, Petitioner's first "reason" is simply school administrators again seeking the authority to make these decisions alone, without the necessity of parental involvement, investigation of the circumstances or discussion by the multi-disciplinary teams. Such an approach contradicts numerous provisions of the EHA statutory scheme. *E.g.*, 20 U.S.C. § 1414(a)(5).

Petitioner's second "reason"—that an acting out student will always benefit from a more structured environment even when

on the "non-handicapped children in the classroom," the sad fact is that Respondents were disciplined for behavior that occurred in classes exclusively comprised of handicapped students. In fact, Doe's placement (Louise Lombard School) is a segregated program for severely handicapped students, and classes such as Smith's Resource Specialist classes, although on the campus of a regular middle school, have no nonhandicapped students in them. Smith's only periods with the regular students were those taken away from him when the District unlawfully modified his program to half-day attendance.

[21] Petitioner suggests that it becomes "stunningly apparent" the placement is inappropriate when the student's behavior is "open and notorious" (no doubt a precise definition of easy applicability). Brief, p. 10.

the behavior is not volitional—arrogates to the school officials the very decision the EHA places in the hands of the IEP team and would do so in a way which insures there is no input from other professionals as to what level of structure is appropriate for the child. In addition, Petitioner seeks to extend this case far beyond its facts and the issues presented below. The courts below in this case enjoined the discipline of a handicapped student for behavior which is "a manifestation of his or her handicapping condition." Yet the Petitioner would "discipline" a disruptive child whatever the cause.[22] Furthermore, it is the school official's responsibility to continually watch for signs of changing conditions which would warrant review and revision of the IEP. 34 C.F.R. §§ 300.343 and 300.534.

The IEP's for both boys in this case specifically described their behavior and the circumstances which would provoke them. The School District was clearly on notice of their unique needs, and yet did little to avert the very situations which the IEP's predicted. John Doe was a large, awkward and odd-looking teenager who was extraordinary susceptible to taunting by his peers, yet no consideration was given to his provocation by the other students.[23] If Doe's placement was, in fact, inappropriate, perhaps it was not because of his behavior, but because the school district had not tried to control the behavior of the other children in the classroom. Similarly, Jack Smith's IEP noted that he "seeks attention . . . [is] highly distractible [and] impulsively takes things"—yet he was expelled from school for making sexual remarks and "disrupting school activities" notwithstanding the recognition that "his actions seem beyond his control." (JA 204, ¶45; 205, ¶¶50-51) Nowhere in his program did the District attempt to provide services to address his impulsive and attention-seeking behavior. Furthermore, neither the local nor state agency ever provided or even

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[22] Petitioner seeks to assuage his position by declaring "when such a child is removed from his current placement for disruptive conduct he is not being punished." Brief, p. 9.

[23] Petitioner allows that "it is also likely that the child's interaction with other children precipitates or at least contributes to his outbursts," but insists nevertheless that the child should be removed. Brief, p. 9.



recommended psychological services to these boys, despite having labeled both of them "seriously emotionally disturbed." See *Max M.* v. *Illinois State Bd. of Educ.*, 629 F.Supp. 1504 (N.D. Ill. 1986).

Petitioner's third "reason" has misplaced the focus and weight to be placed on the potential impact of "disruptive" students on their classmates. The EHA operates from the perspective of the needs of the individual student as determined in the IEP placement decision. 34 C.F.R. § 300.552 Comment. ("The overriding rule in this section is that placement decisions must be made on an individual basis.")[24] The impact of the handicapped students' potentially "disruptive" behavior on classmates is a proper subject of concern and the other students' interests should be balanced in the first instance in the design of the IEP. A major determinant of what are appropriate services for a particular child is the environment in which those services will be delivered.[25] Moreover, Congress established a requirment that children be educated in the least restrictive environment. 20 U.S.C. § 1412(5)(B).

The considerations mandated by the Act in selecting the least restrictive environment for placement of a handicapped child are "the potential harmful effect on the child or on the quality of services which he or she needs." 34 C.F.R. § 300.554. The "chilling effect" his presence may have in the classroom on

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[24] Amici National School Boards Association and Solicitor General support their assertion that the needs of non-handicapped students are paramount to those of a handicapped student in their classroom by citing a later portion of this Comment. Respondents have cited the portion interpreting the EHA. Amici cite a reprint of 34 C.F.R. § 104 App. ¶ 4 issued pursuant to Section 504 of the Rehabilitation Act which the Comment finds to be "pertinent" though not controlling.

[25] Petitioner seeks to avoid the requirements of the stay-put provision by assuring that the child . . .

> "would continue to receive appropriate services, although they would be in a setting other than his current placement."

Brief, p. 11, n. 13.

Of course, that was not the case for Doe and Smith, who were summarily sent home from school, and received interim services only upon the insistence of the federal court's orders.

other students, and the administrative inconvenience or expense his special needs present cannot override the mandate that Congress has expressed. The potential liability of school districts which Petitioner obliquely raises as a justification for his concerns has been considered and rejected before by this Court in construing the EHA:

> The introduction of handicapped children into a school creates numerous new possibilities for injury and liability . . . Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks.

*Irving Independent School District* v. *Tatro supra*, at 893-94, n.12.

Yet at least as important as a handicapped child's academic education is learning how to conduct oneself in public, how to relate to peers appropriately, and how to control the behaviors which (more than his or her intellectual accomplishments) single the child out as "handicapped" and "different." The Superintendent's statement that a child is always going to benefit from a more restrictive environment flies in the face of the statute's intent that "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped." § 1412(5)(B).

Petitioner's fourth "reason" is the familiar cry of "administrative inconvenience." However, Petitioner concedes that:

> It is possible to take some action to protect the other children in the classroom by means other than removing the disruptive child.

Brief at p. 10.

Indeed, in Doe's case a teacher's aide was assigned to supervise classroom order and Doe successfully finished the school year without incident. While Petitioner contends "such measures should not be necessary" (Brief at p. 11), the EHA requires them. 20 U.S.C. § 1401(17) ("such developmental, corrective and other supportive services . . . as *may be required* to assist a handicapped child to benefit from special education"); *New York State Asso. for Retarded Children, Inc.* v. *Carey*, 612 F.2d



644, 650-51 (2d Cir. 1979) ("detrimental effects" of segregating handicapped children).

### C. Under Express Statutory Provisions, The State Education Agency Must Provide Services Directly When A Local Education Agency Refuses To Educate A Handicapped Child.

One need not look further than the title of the Act here in issue to divine the Congressional purpose. The Education For All Handicapped Children Act of 1975 plainly secures the right to an appropriate education for *all* children regardless of the nature or severity of their handicap. 20 U.S.C. § 1412. As recognized in *Rowley, supra*, at p. 203, the responsibility for providing this education lies with the states. Having determined that the states would face a financial burden in discharging this responsibility, the EHA provides monetary assistance in exchange for assurance of compliance with the terms and goals of the Act. The Act specifically holds the state educational agency "responsible for assuring that . . . all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency . . ." 20 U.S.C. § 1412(6).

Although the local education agencies are the primary providers of direct services, Congress determined that in order to effectuate its purpose of education for all students, the state education agency would have to provide direct services in certain situations. Section 1414(d) provides:

> **(d) Special Education And Related Services Provided Directly By State Educational Agencies; Regional Or State Centers**
>
> Whenever a State educational agency determines that a local educational agency—
>
> (1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

Congress sought to avoid a "responsibility gap" in order to insure that no student would go uneducated while local officials and state agencies battle over which entity had the obligation to provide services.

Despite the statutory language, Petitioner argues that the Ninth Circuit erred in its conclusion that the state education agency is responsible for direct provision of services when a local education agency denies any and all services to a handicapped student because of handicap-related misconduct. Petitioner attempts to support his position by claiming that he is only required to protect the rights of excluded *groups* of children rather than excluded *individuals*. He claims that requiring state provision of direct services to excluded individuals does not "make sense." The Congressional mandate in the EHA cannot be so easily dismissed nor can the sensibilities of the jurists below who thoughtfully reviewed Petitioner's responsibilities and his failure to fulfill them.

**1. Congress Imposed Responsibility On The State For Educating Individual Children Who Have Been Excluded From Receiving Services By The Local Education Agency.**

This case arose out of a local education agency's unwillingness to provide any educational services whatsoever



to two handicapped students solely by reason of their handicap.[26] Writing for a unanimous Ninth Circuit panel, Judge Sneed held that where a local agency "refuses or wrongfully neglects to provide a handicapped child with a free appropriate education, that child 'can best be served' on the regional or state level." *Doe* v. *Maher, et al., supra*, at 1492; 20 U.S.C. § 1414(d)(1) and (3). The EHA fully supports that conclusion.

Section 1412(1) requires the state to demonstrate to the Secretary of the U.S. Department of Education that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." Section 1412(6) makes that State responsible for supervising the programs of the local education agencies, and Section 1414(d) requires direct provision of services by the State where services are not provided by the local education agency. *See also*, 34 C.F.R. § 300.360. The Ninth Circuit recognized these broad responsibilities placed on the State by the EHA and, after examining the Act and the facts of this case, determined that Congress meant what it said: all handicapped children are entitled to an appropriate education and if the local education agency is unwilling to provide services, the State must either compel the local educational agency to provide services pursuant to its obligation to assure compliance or provide those services directly.[27]

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[26] The local education agency (San Francisco Unified School District; "SFUSD") stipulated that "[f]rom November 6 to November 26, 1980, defendant SFUSD did not allow plaintiff Doe to attend his classes at Louise Lombard School, nor did defendants provide plaintiff Doe any alternative educational placement." (JA 201) The SFUSD also stipulated that "[a]fter November 14, 1980, the SFUSD did not allow plaintiff Smith to return to his educational placement" and from "November 14 to December 10, 1980, plaintiff Smith was not provided an alternative educational program." (JA 206) It was undisputed that Respondents' conduct that was the basis for denial of all services arose out of their handicaps. See, Order filed June 17, 1983. (JA 217-219)

[27] The Solicitor General's brief *amicus curiae* agrees with Respondents that the local agencies are the "major providers of direct services" (pp. 26-27). He also agrees that the state must compel a local agency to fulfill its responsibilities under the EHA where the local agency has refused to do so (p. 29). However, the Solicitor General's overall position would require a handicapped student who has been denied all educational services contained in his current

The legislative history points directly to the state education agency as the guarantor of educational services.

> "The committee bill requires that the State educational agency be responsible for *insuring* that all requirements of the Act are carried out, and that all education programs for handicapped children within the State, including all such programs administered by any other State or local agency, must meet State educational agency standards and be under the general supervision of persons responsible for education of handicapped children."

S. Rep. No. 168, 94th Cong., 1st Sess. 24 (1975).

The report further explained that those requirements had a specific purpose:

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children and to assure that in the implementation of all provisions of the Act and in carrying out the right to education for handicapped children, the *State* educational agency shall be the responsible agency."
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided . . . While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. *Id.*

The Official Comment to 34 C.F.R. § 300.600 incorporates the above legislative history and notes that the state responsibility for all educational programs "reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each state."[28]

IEP to wait until the "due process" procedures are completed to obtain services to which he is currently—and continuously—entitled under 20 U.S.C. § 1415(e)(3). The Solicitor General mischaracterizes the refused services as "desired services" (p. 29) rather than services to which the student is clearly entitled according to his/her then current IEP. This error is akin to Petitioner's mischaracterization of SFUSD's refusal to serve Respondents solely by reason of their handicaps as Respondents having "encountered difficulty" with the District (see discussion, *infra*, pp. 41-42. The logic of both arguments is fatally flawed as a result.



For too long, state and local agencies pointed the finger of responsibility at each other while numerous handicapped children grew into adulthood without ever having received the benefit of any education. Congress sought to guarantee that the state could be counted upon to make sure that handicapped children were not denied services while battles raged over whose job it was to educate them and what form the education would take. Discussing state responsibilities, the Senate report stated, "The Committee considers the establishment of single agency responsibility for assuring the right to education of all handicapped children of paramount importance." S. Rep. No. 168, 94th Cong., 1st Sess. 24 (1975). The legislative history is replete with similar statements. See, for example, 120 Cong. Rec. 15269 (daily ed., May 20, 1974).

Petitioner avers that he is only responsible if the failure to provide services is on a district-wide, systemic basis rather than in individual cases.[29] He points to Section 1414's inclusion of the words "children" and "programs" to support his position.[30] This is absurb. Acceptance of this position would mean that any statute referring to individuals collectively does not

[28] The Official Comment was written by the U.S. Dept. of Health, Education and Welfare, which administered the EHA prior to creation of the Dept. of Education. Its interpretation is, thus, entitled to considerable deference. See discussion, *supra*, pp. 26-27.

[29] Petitioner apparently has changed his position. In his brief to the Ninth Circuit he concedes that ". . . in extreme cases, where handicapped students would otherwise be deprived of all services, . . . the state [is] required to provide services directly." [State Superintendent of Public Instruction] Appellants' Brief, dated Dec. 6, 1984, p. 19. The local school district stipulated that it had denied all services to respondents. (JA 201) Their situation *was* extreme. The Ninth Circuit agreed and defined "extreme cases" to exist when a local agency breaches its responsibilities in a "significant" manner.

[30] The Solicitor General avers that 1414(d) only addresses two situations: (1) a small school district; and (2) a student best served by the State for economic reasons. The regulatory interpretation is actually much broader. 34 C.F.R. § 300.360.

guarantee those same rights to each of them individually. For example, the United States Constitution would protect the rights of citizens of the United States but not the rights of an individual citizen, unless the terminology "each citizen" is used.

In numerous ways the EHA demonstrates that Congress guaranteed that each handicapped child is to be educated. For example, the Act requires Individualized Education Programs for each child. That requirement manifests Congressional intent to address the unique needs of the individual handicapped child. *Rowley* states that, in order to determine State compliance with its responsibilities under the EHA, a court is required "not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the *State* has created *an* IEP for *the child* in question . . ." *Rowley, supra,* at pp. 206-207, n. 27.

In addition, the state does not receive funds to distribute to local agencies in an *ad hoc* manner. Those funds are distributed on a *pro rata* basis according to each child receiving services. 20 U.S.C. § 1411. The funds are to provide for the *individual* needs of *each* handicapped child. 20 U.S.C. § 1412, *Rowley, supra,* at pp. 179-84. Where that is not being done by local agencies, the funds are to be used by the state to provide for both an individual child or for groups of children as necessary. The regulation promulgated pursuant to the section of the EHA addressing State use of funds defines "direct services" as "services provided to *a* handicapped *child* by the *State* directly, by contract, or through other arrangements." 34 C.F.R. § 300.370(b). See also, 20 U.S.C. § 1411(b)(2), (c)(2).

Furthermore, in this case, the individual deprivations resulted from a district-wide policy that allowed withdrawal of all educational services as punishment for handicap-related conduct, punishment effected in total disregard for students' EHA procedural rights. The SFUSD stipulated that its general discipline policy was the only policy used for discipline matters in the district (JA 200-201, ¶'s 15, 10, 27, 29) and that it did not include any provision for addressing the issue of whether the behavior complained of arose out of the student's



handicap. (JA 100, ¶17) Here was a district-wide policy and practice of expelling or excluding handicapped students because of their handicaps. Even under the Petitioner's skewed view of the extent of his responsibilities, it was appropriate for the Ninth Circuit to hold that the EHA requires provision of services directly by the state to students who suffer denial of all services by the local agency pursuant to a district policy.

The Petitioner asserts that "it does not make sense" to require the state education agency to provide services where a handicapped child "has encountered difficulty" with the local education agency. Brief, p. 16. It must be clear to this Court that Respondents did not "encounter difficulty." They were summarily excluded from school. This was not a dispute within the IEP development process over whether service A is more appropriate than service B. Here, the local agency arbitrarily withdrew all educational services to Respondents because of behavior which was a manifestation of their handicaps and denied them access to their EHA rights to challenge the cessation of services.[31] The district's actions constituted a complete negation of the EHA—substantively and procedurally—and can hardly be characterized "as a bit of difficulty."[32]

The EHA established priorities for serving handicapped children. The first priority was provision of appropriate services to handicapped children who were excluded from education entirely. 20 U.S.C. § 1412(3). The local education agency in this case closed the school doors on Respondents. In accordance with all of its obligations under the EHA, it was incumbent on the State to re-open those doors. Congress made sure that students could not be denied an education as a result of the

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[31] The local agency refused to even convene an IEP meeting for Doe until so ordered by the District Court. (CR 11) (Temporary Restraining Order); (JA 63-66) (Preliminary Injunction). Smith's exclusion hearing was cancelled and an IEP meeting scheduled only subsequent to Doe's court orders and contact with the district by the same counsel.

[32] The Ninth Circuit acknowledged the importance of the facts in this case in its limitation on the Petitioner's duty to provide services to individuals to those cases where the breach of the local agency's responsibilities is "significant." 793 F.2d at 1487.

unwillingness of a local agency to provide services by expressly placing ultimate responsibility for education on the State and establishing access to services as a first priority. The Ninth Circuit followed this Congressional mandate by enjoining the State Superintendent to provide services directly in cases such as this.

**2. Direct Provision Of Services By The State Effectuates EHA Procedures.**

Petitioner suggests the Ninth Circuit sanctioned a student's bypassing the remedies contained in 20 U.S.C. Section 1415 and electing provision of services directly by the state instead. On the contrary, the District Court and the Ninth Circuit firmly established the applicability of Section 1415 in discipline cases involving handicapped students. The threshold issue before the district court on Doe's application for a temporary restraining order was whether the school district could continue to deny him access to his Section 1415 rights. Having determined that Section 1415 did apply, the District Court issued permanent injunctions that integrated Section 1415 with the state discipline statutes. The Ninth Circuit affirmed the applicability of Section 1415 for resolution of a dispute over denial of educational services for disciplinary reasons.

The requirement that the state provide services directly does not force a state to prejudge a local district's position regarding the substance of a dispute. A careful reading of the Ninth Circuit opinion reveals that the injunction in issue addressed the situation in which a student might be wrongfully denied all educational services as a result of a local education agency's violation of the "stay put" provision of Section 1415(e)(3).

A student in a dispute with the local agency is entitled to the placement and services of his/her *current* IEP pending completion of the Section 1415 review proceedings. Once this Court affirms the plain language of Section 1415(e)(3), a local agency will be hard-pressed to justify denial of services contained in an IEP absent a court order or parental agreement. The State education agency is only required to provide services directly



where a local district is unable or unwilling to provide the services to which a student is entitled. Until an IEP is changed by agreement, administrative decision, or court order, a student is entitled to no more or less than what is called for in it. Thus, no "pre-judging" is required, nor election of remedies.

The sole issue for the State to determine is whether the "stay put" provision has been complied with by the local education agency pending completion of Section 1415 procedures. If the local district is disregarding its obligation under the "stay put" provision by not providing the placement and services contained in the current IEP, the state *will* have to either compel compliance or provide services directly. Respondents respectfully suggest that the State will not often be called upon to provide direct services in individual cases in the face of a Supreme Court decision mandating compliance with the plain language of Section 1415(e)(3) as long as the State itself is fulfilling its other responsibilities under the Act.

**3. The State Education Agency Has The Capacity To Provide Services Directly.**

Under the State's obligation to monitor the local education agency's procedures and compel compliance to the Act, a state which is vigorous in compelling obedience to the "stay-put" provisions should never end up in the position of having to provide services directly. In the event that a local district would boldly disregard a decision of this Court and a directive from the State to provide the placement and services required by the current IEP, Petitioner *would* be required to provide services directly in an individual case. However, the State does not need "roving teams" of educators, as Petitioner claims, to do so. The EHA provides for a continuum of placements ranging from public school to private school to institutions. 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.551. The State and local school districts have contractual relationships with many, if not all, of the non-public schools and institutions certified to serve handicapped children in their area. Although a student *may* as a result end up in a more restrictive environment pending completion of the Section 1415 procedures, the State can easily identify the available non-public schools and, using the monies

it would otherwise give the district for the individual child, reach an agreement with the parents to contract for those services with existing educational entities. Moreover, the State is empowered to refer the student to a similar public program in a neighboring school district, perhaps also providing the transportation necessary for the student's attendance. Cal. Educ. Code § 56172 & § 46600. Certainly, a different or more restrictive environment is preferable to no educational services whatsoever.[33] The entire purpose of the EHA is to guarantee an education to *all* handicapped children. The state education agency is ultimately responsible for backstopping the guarantee. Congress has determined that the State must bear the burden of providing the education—the handicapped child must no longer suffer the weight of the battle for access to the classroom.

**4. Equitable Considerations Support The Obligation Of The State To Provide Services Directly.**

It is in the spirit of balancing of equities that the Ninth Circuit's decision should be affirmed even if this Court does not accept Respondents' view of the Act's requirements. This Court has recognized that under Section 1415(e)(2) of the EHA, equitable considerations are relevant in fashioning relief. *Burlington, supra*, at 374. Although Respondents and the Eleventh, Third and Ninth Circuits[34] believe that the EHA itself requires direct provision of services by the state in individual cases, Petitioner asserts otherwise. Yet even if Petitioner is correct, the balance of equities here tips sharply in favor of a remedy requiring state-provided services in the face of a cessation of educational services solely by reason of handicap.[35]

[33] The Solicitor General argues that Congress could not have intended a state to provide services when a local agency has an appropriate less restrictive environment even though the local agency refuses to serve the child in any environment. Respondents agree that the student is "best served" by the State compelling the local agency to provide the services. However, where the local agency continues to refuse services, a student is clearly "best served" by placement in the next "least restrictive environment" rather than by exclusion from all educational services.

[34] See, *G.A.R.C.* v. *McDaniel*, 511 F.Supp. 1263 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983), *vacated on other grounds*, 468 U.S. 1213 (1984); *Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981); *Doe* v. *Maher*, *supra*.



The EHA guarantees Respondents a free appropriate education regardless of the nature or severity of their handicaps. If a school official wants to change a student's program, or, as in this case expel or exclude a student, the EHA requires convening an IEP team. 20 U.S.C. § 1414(a)(5). If there is a dispute, the EHA requires that the current program, *i.e.*, the *status quo*, be maintained. 20 U.S.C. § 1415(e)(3). The EHA procedural scheme was devised to effectuate the overall purpose of the Act—the provision of educational services to all children. If the services required by the current IEP are denied by the local education agebncy prior to resolution of the dispute, the student suffers a loss of all educational services, contrary to the intent of the EHA. If the State provides services directly in such a situation, the student receives an education pending completion of proceedings from money provided to the State under the EHA for precisely that purpose. What is the harm to the state? The State might provide educational services

[35] Ordinarily in a case in which a federally funded education agency has failed to serve a student solely because of the nature or severity of his or her handicap, this Court's review of the relief granted would involve examination of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). Section 504 prohibits any agency receiving federal financial assistance from discrimination against persons solely by reason of their handicap(s). The District Court in this case based its injunction on violations of § 504 as well as of the EHA and 42 U.S.C. § 1983. (JA 245) Subsequently, this Court decided *Smith* v. *Robinson*, 468 U.S. 992 (1984) which compelled the District Court to dismiss Respondents' causes of action based on § 504 and § 1983.

However, Congress responded to *Smith* by enacting 20 U.S.C. § 1415(f) to preserve causes of action under statutes other than the EHA in special education cases. This case thus comes before this Court solely on an EHA-based cause of action due to the historical accident of its occurrence during an unsettled period in the law on exclusivity of the EHA remedies. Nonetheless, Respondents submit that the remedy of direct provision of services by the State is wholly within the discretion of a court fashioning a remedy to redress a violation of any of the statutes which are, should be, or could be at issue here.

according to an IEP that is later changed. The State might have accounting difficulties or strained relations with the local agency. This Court has observed that "the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child." *Goss* v. *Lopez*, *supra*, at 576. There has been no showing of substantial harm that would be suffered by the state, in contrast to the potential loss of significant periods of education[36] by a student particularly vulnerable to suffering significant setbacks during educational breaks.[37]

Requiring provision of an education by the agency ultimately responsible for such education is certainly more in the public interest than denying services to a student whose position may well be vindicated at the completion of review proceedings. Similarly, it is a better solution than withholding funds to the whole district, thus risking educational deprivation not only to the student in question but to all handicapped children served by the local agency.[38] In light of specific provisions of the EHA

[36] This Court recognized in *Burlington*, *supra*, at 370, that the administrative and judicial review process is "ponderous," usually taking years to complete.

[37] *See*, for example, testimony on regression of handicapped students during educational breaks in *Armstrong* v. *Kline*, 476 F.Supp. 583, 594-597 (E.D. Pa. 1979), *cert. denied*, 452 U.S. 968 (1981).

[38] 20 U.S.C. § 1416(a) describes a procedure distinct from the § 1415 due process procedure. A student can notify the Secretary of the U.S. Department of Education of local or state agency failure to comply with the Act. If the Secretary determines, after notice and a hearing, that the agency has failed to comply substantially with its responsibilities, federal monies can be withheld until compliance is obtained. The Solicitor General argues that this remedy is adequate in cases where a local agency persistently refuses to provide services and a state fails to compel their provision by the local agency. The facts of this case highlight the inadequacy of such a remedy absent a requirement that the State provide services directly when a local agency refuses to do so. The remedy provided by § 1416(a) would not have returned Respondents to school but would have resulted (after a time-consuming investigation and hearing process) in a cut-off of funds necessary for their educational expenses as well as their peers. The remedy does not redress the immediate harm. A remedy is required that has the students back in school and that remedy is direct provision of services by the state agency if the local



which require direct provision of services by the state, it was within the equitable discretion of the Ninth Circuit to require state provision of direct services to individuals when a local agency significantly breaches its responsibilities and the state has been unable to compel compliance by the local educational agency.[39] This ruling is wholly consistent with the conditions regulating receipt of funds under the EHA and the goals of the Act in its entirety.

Moreover, the remedy of state responsibility here came as a result of a clear system-wide and statewide violation of the EHA. When this suit began, neither the SFUSD nor the State of California had any policy or program for the application of the EHA to student discipline. Students such as Doe were routinely expelled from school for behavior that was a manifestation of their handicaps, and thus unlawfully denied all educational benefits. It was in the context of this system-wide and statewide failure of responsibility that the District Court ordered the State to adopt a policy and program, the School District to adopt and implement them at the local level, and the State to provide the "backstop" of direct provision of educational services, if, despite the state and local pronouncements, a handicapped child was denied educational benefits in violation of the EHA.

Furthermore, Petitioner has not sought review of the Ninth Circuit's holding that the State failed to have a policy which adequately protected handicapped students in discipline matters and that "the state's monitoring procedure was demonstrably insufficient to protect the rights of handicapped students such as Smith and Doe."[40] 793 F.2d at 1492. Therefore, these

agency refuses to serve the child. Of course, once the students are receiving the services to which they are entitled pending resolution of the dispute over placement, pursuing the remedy in § 1416(a) may be appropriate in order to ensure future compliance with the Act.

[39] This relief also provides an incentive to the State to fulfill its obligations to ensure local compliance and thus avoid having to provide services directly.

[40] The lower courts are not alone in their assessments of Petitioner's failures under the EHA. Since those decisions, the U.S. Department of Education's Office of the Assistant Secretary for Special Education and

conclusions are final and, in the context of such violations of the most basic components of Petitioner's supervisory responsibilities under the EHA, provide ample support for the court's fashioning of appropriate relief under 20 U.S.C. § 1415(e)(2).

Respondents have shown that they are clearly entitled to the relief ordered by the District Court and affirmed by the Ninth Circuit. Even were the State Department of Education's direct provision of services not contemplated by the EHA, such injunctive relief would be well within the court's discretion given the statutory violations found in this case. *Hills* v. *Gautreaux*, 425 U.S. 284, 293-94 (1976) (scope of remedy should fit "nature and extent" of the violation); *Ephraim Freightways, Inc.* v. *Red Ball Motor Freight, Inc.*, 376 F.2d 40, 41 (10th Cir. 1967), *cert. denied*, 389 U.S. 829 (1967) ("Equitable injunction includes the power to provide complete relief in light of the statutory purpose."); *E.g.*, *United States* v. *Lowe's, Inc.*, 371 U.S. 38, 53 (1962) (injunction of violations of Sherman & Clayton Acts can impose obligations not otherwise required under those acts). The Ninth Circuit properly affirmed the trial court, and its ruling should also be affirmed.

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Rehabilitative Services has reviewed the California Department of Education. The preliminary report, issued September 19, 1986, finds Petitioner's monitoring system to be deficient. See pp. 1-8. (For convenience, a copy of this public document has been provided for the Clerk of the Court.) Furthermore, the report finds Petitioner's agency to be failing its fulfillment of responsibilities throughout the entire EHA.



## CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the alternative, the decision of the court of appeals, insofar as it regards the two issues on which certiorari was granted, should be affirmed.

Respectfully submitted,

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Dated: June 22, 1987

# REPLY BRIEF

(16)

Supreme Court, U.S.
FILED
OCT 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT,
OF PUBLIC INSTRUCTION,
*Petitioner,*

VS.

JOHN DOE AND JACK SMITH,
*Respondents.*

**On Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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No. 86-728

# In the Supreme Court

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OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT,
OF PUBLIC INSTRUCTION,
*Petitioner,*

VS.

JOHN DOE AND JACK SMITH,
*Respondents.*

**On Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY BRIEF

### I. THE PETITION WAS PROPERLY GRANTED AND THE ISSUES DESIGNATED FOR REVIEW SHOULD BE DECIDED BY THIS COURT

Respondents argue that the instant petition should be dismissed as being improvidently granted. According to respondents, the question whether the "stay put" provision bars school administrators from removing dangerous children from their current placement was not pressed or passed on in the courts below. (Respondents Br. pp. 10-13, 14-15, 30-35.) The respondents are plainly in error.

1. The uncontroverted facts in the record establish that Doe and Smith were suspended because of conduct which was reasonably perceived to be dangerous.[1] The principal of Doe's school

[1] Respondents are critical of our use of the word "disruptive" when applied to behavior exemplified by that of the children in issue here.

stated in part, "On November 6, 1980, an incident occurred involving . . . John Doe. The incident in question involved two events, the first of which was that John Doe strangled a fellow student at Louise Lombard School so severely as to cause abrasions to the child's neck and secondly, while being escorted to the Principal's Office for discipline, kicked out a window at the school. The strangling of a child was the second such incident involving John Doe. . . . John Doe was under supervision at the time that both the strangling incidents occurred. *As a result of the above incident* I felt that it was necessary to have John Doe removed from Louise Lombard School." (J.A. 209; emphasis added.) The dean of Jack Smith's school similarly stated that: "Among Jack Smith's actions that required discipline were the stealing of purses and school property, extortion of other students, the making of sexual remarks to girls, and the touching or grabbing of girls. . . . Jack always admitted doing the acts of which he was accused. . . . On November 14, 1980 Jack Smith was suspended from Giannini for disrupting school activities, making sexual remarks to girls, and making sexual gestures. As indicated from the above, this was just a continuation in a long series of incidents involving Jack. . . . " (J.A. 211.)

In short, contrary to respondents' suggestion, the propulsion for the children's removal was the reasonable perception that they were dangerous.[2]

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(See e.g., Respondents' Br. page 13, fn. 3; p. 18, fn. 7.) Respondents may have a point, although their own formulation is only marginally better. The word "disruptive" is imprecise in the instant context. On the other hand, we find the use of the term "dangerous children" distasteful since it does not describe episodic conduct but is rather a stigmatizing general characterization. Such fine semantic distinctions should not divert this court however. It is clear that throughout this case we have been referring to children whose action is either violent and physically threatening or so seriously subversive of the educational environment as to constitute a danger to others (e.g., respondent Smith's extortion, stealing, sexual gestures and remarks). For want of a better term, we use the term "dangerous" to describe the conduct of these children.

[2] Respondents further argue that the issue is not properly framed because the school district failed to make a specific finding that these



2. The question whether the stay put provision bars the removal of dangerous children was in fact pressed and passed on in the courts below. In his complaint, John Doe alleged, "31. Respondent has been denied his right, guaranteed to him by the Education of the Handicapped Act, to remain in his educational placement while proceedings concerning his educational placement take place." (J.A. 10.) In his complaint in intervention, Jack Smith similarly alleged, "52. Defendants have violated the Education of the Handicapped Act, 20 U.S.C. section 1415(e)(3) and 34 CFR section 121(a).513, by denying plaintiff-intervenor his right to remain in his current educational placement during proceedings relating to plaintiff-intervenor's placement and proceedings relating to the provision of a free, appropriate public education by excluding plaintiff-intervenor from his full day educational placement." And, in their motion for summary judgment in the trial court, respondents argued the point, stating that "the handicapped student has the right to remain in his/her current educational placement or program, even if that placement or program is inappropriate, until a new appropriate placement is finally determined by agreement of the parents or guardian or by a final determination or judicial decision." (Docket No. 278, page 22.) The courts below then held that the dangerousness of the children did not affect whether the "stay put" provision applied. (Pet. App. A.19–A.21; J.A. 221, 223-226.)[3]

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children were in fact dangerous. (Respondents' Br. p. 11.) In support of that assertion, they rely on certain language from the district court's decision. (See J.A. 222.) That reliance is misplaced. The district court was discussing an entirely different issue. It was examining whether the school district had complied with the requirement of the California statute that regulates the circumstances in which extended suspensions or expulsions may be imposed. The question before this Court simply does not concern whether the school district properly justified extended suspensions or expulsions under state law. Here, the question is whether a dangerous child must be returned to the classroom while his review proceedings are pending, regardless of the specific disciplinary action taken after such removal.

[3] The courts below clearly viewed the question whether or not the children were in fact dangerous as irrelevant to the "stay put" provision's

3. In summary, the facts and the attention given them below properly raise the question whether the action of the local school authorities violated the stay put provision of the EHA and whether they must be enjoined to keep those children in their current placement. Certiorari was appropriately granted.

## II. REPONDENTS' INFLEXIBLE INTERPRETATION OF THE STAY PUT STATUTE WOULD VIOLATE THE INTENT OF CONGRESS

Commencing on page 15 of their brief, respondents argue that the only exception to the stay put provision is the one which permits a change in placement if the school authorities and the parents agree. Respondents argue that it is expected that parents will act reasonably and that "in most cases a parent will be grateful for the administrator's attempt to address the problems". (Respondents' Br., p. 19.) But what about those cases where the parents are not grateful, where they believe they must stand with their child who has told them he wants to go back to his current placement?[4] The problem cannot be dismissed on the supposition that the parents and school authorities will likely agree and that the problem will only rarely arise.

1. As we have observed, respondents argue that except for the parent-school agreement, there are no exceptions to the auto-

applicability. Dangerous or not, the lower courts ruled the children must "stay put" because that statutory provision is "automatic". And both courts reached that question because, in their view, "stay put" would apply if the misconduct is related to the handicap. (See Ninth Circuit's opinion at Pet.App. A.19.) The court of appeal acknowledged but rejected a contrary view of other courts of appeal. (Pet.App. A.20-21.) It is that contrary view which we believe is correct and should be the law.

[4] Indeed, in this very case Smith's grandparents uniformly rejected all advice given to them by the education agency and sided with their grandchild despite overwhelming evidence of his dangerous conduct. The dean at Smith's school stated in his declaration, "His grandparents defended Jack every step of the way and every recommendation made by school staff was rejected by the grandparents." (J.A. 211.) See also *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley* (1982) 458 U.S. 176, 184-185.



matic application of the stay put provision. Faced with the court's *Burlington* decision, respondents make the startling assertion that *Burlington* was not an exception. (Respondents' Br., pp. 29-30.) We discussed *Burlington* in our opening brief; let us return to it. The parents in *Burlington* refused to allow their child to stay put during the pendency of review proceedings. They placed their child in another school and sought tuition reimbursement from the education agency. The agency argued that the parents had violated the stay put provision of the EHA. This Court recognized that indeed the child had not stayed put, but nevertheless ruled that this use of the stay put provision would violate the intent of Congress. Similarly, we are maintaining here that keeping an unmanageable, dangerous child in the very placement where he has wreaked damage would violate the intent of Congress.

2. Not for a moment are we suggesting that this Court ignore the will of Congress or carve out an exception where none was intended. Congress, we submit, wished to assure that handicapped children were guaranteed a free *appropriate* education and enacted the "stay put" provision to facilitate achievement of that goal. Congress could not have intended the "stay put" provision to provide a license for a child to endanger others—to act out in such a way as to destroy property, cause physical injury to other students, or instill such fear in others that their daily trip to school becomes a traumatic excursion.

Respondents have been unable to demonstrate that Congress rejected the construction of the statute we offer here.[5] Rather,

[5] Respondents point out that in passing the EHA Congress was influenced by *Mills v. Bd. of Ed.* (D.D.C. 1972) 348 F.Supp.866 and *Pennsylvania Ass'n. for Retarded Children v. Pennsylvania* (E.D. Pa. 1972) 343 F.Supp.279 *(PARC)*. If anything the decisions in those cases support us, not respondents. In *Mills* several of the children involved had behavioral problems but there was no indication they were dangerous. In ruling that all the children would stay put the court did not differentiate between dangerous and non-dangerous children nor did it refer to "extraordinary circumstances." By contrast, such a distinction was made in *PARC*. In that case the court noted that the school "asserts that injury flows to the school districts because . . . they will be unable to remove a disruptive retarded child from regular classes immediately . . . In any

respondents and their amici have misstated our position and then used general legislative comments to condemn it. They insist that our view is that handicapped children can be expelled or suspended indefinitely based on conduct which is related to their handicap. They also suggest that our position is that a child may be removed from the classroom for dangerous conduct and then deprived of all educational services and due process[6] while review proceedings are pending. As explained in our opening brief (p. 11, fn. 15), nothing could be further from the truth. We do not believe the local San Francisco Unified School District acted properly in this case. We believe the district made a number of procedural mistakes in its eagerness to protect other students from Doe and Smith. But we do believe that the San Francisco Unified School District was entitled to remove Doe and Smith from the classroom pending the completion of administrative and judicial proceedings. The stay put provision should not be interpreted to require a school district to maintain such dangerous children with other children.[7]

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case, the Amended Stipulation on hearings provides that in 'extraordinary circumstances' the Director of the Bureau of Special Education *may authorize tentative assignment* to precede the hearing." 343 F.Supp. 279, 301. (Emphasis added.) Significantly, respondents discuss *Mills* but devote nary a word to *PARC*.

[6] Respondents make a halfhearted effort to raise a *Goss v. Lopez* (1975) 419 U.S. 565 problem. (Respondents' Br., p. 26.) In *Goss* this court said that a student should be given "oral or written notice of the charges against him and, *if he denies them*, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581. (Emphasis added.) Here both the children admitted their misconduct, J.A. 209, 211, so there were no *Goss* issues.

Similarly, the suggestion that the 20 or 30 day suspensions authorized by the Ninth Circuit violate *Goss* (Respondents' Br., p. 26) lacks merit. The Ninth Circuit did not say that the child, if he denies the conduct attributed to him, is not entitled to *Goss* protections. Clearly, such due process procedures must be followed and within the *Goss* time frame. The question here is, once *Goss* has been satisfied and the child has been properly suspended, must he thereafter be returned to his placement pending review proceedings?



3. Respondents in fact do not believe in the literalism they advocate in this Court. They suggest that the district can use

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[7] A hypothetical will illustrate how we think Congress intended the stay put provision to operate. Let us assume that a child—we will call him Jimmy—becomes violent in the classroom. School authorities must have the right to remove Jimmy from the classroom immediately. He would then be put on suspension while an IEP team convened to consider his conduct and devise an appropriate placement for him. The IEP team, let us say, determines that Jimmy's outburst was an isolated occurrence unlikely to recur and that his current placement is appropriate. Jimmy would be returned to the classroom immediately.

If, however, the IEP team confirms that Jimmy is dangerous, the team would then be required to determine whether his behavior was related to his handicap. If the team concluded the behavior was *not* related to his handicap it could recommend either an alternative placement or extended suspension or expulsion. On the other hand, if it concluded that the behavior, while dangerous, was a manifestation of Jimmy's handicap then it could not recommend expulsion or extended suspension. A handicapped child in those circumstances is entitled to continued services.

Let us further suppose that the IEP team recommends a change in placement. If Jimmy's parents agree, then there is no problem. But let us suppose that the parents insist that Jimmy go back to the same classroom where he committed his violent acts. The parents retain a lawyer who commences the review proceedings authorized by the EHA. During those proceedings, Jimmy would be put in the placement recommended by the IEP team.

It is true that years later, when the review proceedings have been exhausted, it may be determined that Jimmy should have been returned to his original classroom. Assuming that is the final outcome, how has Jimmy been danaged? Arguably he has not received the benefit of mainstreaming or he has been educated in a setting which ultimately has been determined to be unduly restrictive. We do not say such damage is inconsequential, but merely that when balanced against the possibly mortal danger Jimmy would pose by being returned prematurely to his classroom the damage must be tolerated. Any reasonable person would choose a slightly inappropriate placement over potential catastrophe. That is what Congress must have intended.

various kinds of related services to control dangerous children without changing their placement. (Respondents' Br. pp. 24, et seq.) The problem with that argument is that the IEP sets forth the components of the child's placement, including related services (20 U.S.C. 1401 (19)). If these components must be changed to reflect the addition of related services then, according to the U.S. Department of Education, a change in placement has taken place. (See Amicus Br. of Solicitor General, p. 23, n. 13.) This means that putting an aide in the classroom to guard the dangerous child or providing psychological counseling or the like would be a change of placement, a procedure which respondents claim the "stay put" provision prohibits.

4. Respondents' lack of confidence in their position is evidenced by their obvious discomfiture with the Ninth Circuit's holding concerning section 1415(e)(3). Respondents state, "The concept of section 1415(e)(3) as an 'automatic stay' which allegedly robs the courts of any discretion to issue equitable orders . . . has been . . . rejected by the First Circuit *just as it was in the Ninth Circuit.*" (Respondents' Br., pp. 27-28; emphasis added.) We are mystified as to how respondents could make that assertion in light of the Ninth Circuit's statement that "section 1415(e)(3) does not list any exceptions to its automatic injunction." (Pet. App. A. 21.)

Respondents are in a difficult position. They realize that the Ninth Circuit has taken a rigid position on the stay put issue. They appear to acknowledge that this position is indefensible. This is reflected by their statement that when "the child continues to pose a serious threat in his placement, the scales of equity will certainly tip in favor of an injunction outweighing the stay put provision." (Respondents' Br., p. 27.) The quoted language is an attempt by respondents to rewrite the Ninth Circuit's opinion, to make it less rigid, to modify its holding that the stay put injunction is "automatic." While the Ninth Circuit does say that a district court may grant relief in exigent circumstances there is no indication that such relief may override the automatic nature of the stay put injunction.

But even in asserting that section 1415(e)(3) does not operate automatically, respondents have made a serious analytical error.



They indicate that school officials have authority under the EHA to seek "appropriate relief", including an injunction.[8] In support they cite section 1415(e)(2). (Respondents Br., p. 27.) The fact is that that statute does not provide the relief described by respondents. Section 1415(e)(2) does not permit school authorities to obtain immediate relief from a district court in cases where a child is endangering others. Section 1415(e)(2) is a last step, not a first one. As this court has noted, that section is available only after administrative due process hearings have taken place. *Rowley, supra,* 458 U.S. at 183; *Smith v. Robinson* (1984) 468 U.S. 992.

Our point is that Congress did not intend to burden school districts with the obligation to go to court whenever they are called upon to deal with a dangerous child. School authorities must have the latitude to keep that child out of his current placement (without cutting off educational services to him) while review proceedings are pending.

## III. THE STATE NEED NOT PROVIDE DIRECT SERVICES TO AN INDIVIDUAL CHILD WHO HAS A DISPUTE WITH A LOCAL DISTRICT

In arguing that the state should provide services when an individual child has problems with the local school district, respondents are ignoring the vertical aspect of the statutory scheme. Their argument is erroneously premised on the view that the state and local district are equally responsible for delivering services, that if a child is displeased with the services he receives from one, he can turn to the other. That is not what Congress intended.

The local school districts are charged with providing services. It is the local district which must develop the IEP, the primary tool in determining what type of service is appropriate for a particular

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[8] In shifting ground to injunctive remedies allegedly available to a *school district*, respondents never really answer the Solicitor General's argument that an injunction in favor of a *child* should issue only where there has been a balancing of equities and a showing of irreparable injury.

child. (20 U.S.C. § 1401(18), (19), and (22).) It is in the local setting that the child will be mainstreamed with his peers. It is local professional personnel who are most familiar with the child's history, capabilities, and family situation, and with the resources available to serve the child.

If the local district fails to discharge its obligations to a particular child, the statute provides for remedies. The child's parents or representative would immediately complain to the state educational agency (§ 1415(b)(1)(E), § 1415(c)), which would afford the child a hearing (§ 1415(b)(2). If it determined the child's position was found to be meritorious, the state would take steps to compel the district to provide the necessary services (§ 1412(6)). If the child remained dissatisfied he could thereafter seek relief from the district court (§ 1415(e)(2)).

This approach is manifestly reasonable. It enables all parties to present their points of view. It is an orderly method by which it can be determined whether or not the district is doing its job or whether, conversely, the parents or child's representative are being unreasonable. In the final analysis, it permits a resolution of the dispute based on a full examination of the facts.

By contrast, no such orderly determination is possible if respondents' view is accepted. Respondents eschew section 1415 procedures but provide no guidance on the critical issue concerning how one decides whether the local district has failed to offer a particular child appropriate educational services. In this connection respondents make a curious argument that the state need provide direct services only when the local district has violated the "stay put" provision. (Respondents' Br., p. 43.) They assert, "If the local district is disregarding its obligation under the 'stay put' provision by not providing the placement and services contained in the current IEP, the state *will* have to either compel compliance or provide services directly." *Id.* The fact is that the Ninth Circuit's decision regarding direct services is not so narrow; it does not purport to limit itself to cases where the local district has violated the "stay put" provision. (See Pet. A.31-33.) Second, neither the Ninth Circuit nor the EHA provides for the choice favored by respondents, i.e., that the state may choose either to



compel the district to comply or to provide services directly. This notion is totally without supporting authority.

The state's responsibilities under the EHA are different from the local districts'. The state must have an overall plan. (§ 1413(a).) It supervises local districts and is accountable for what they do. (§ 1412(b).) It provides for hearings where requested. (§ 1412(5).) Where the local district is derelict in its duty the state takes steps to assure that the district complies with its obligations.

The Congressional scheme makes clear, however, that when it comes to direct services the state's role is limited. Where the district is a small one and cannot provide a district-wide program for its handicapped children, the state provides the services. (See 34 CFR § 300.360(a)(1).) Or where there is a need for a regional center or other special institution which would serve a number of districts, the state once again provides the services. Finally, in the rare instance where a district simply declines—for budgetary, political or other reasons—to put in place a program which will provide appropriate education for the handicapped children in that district, the state will establish the program.

The Congressional scheme is comprehensive. For the majority of handicapped children educational services are provided by local school districts. Aggrieved children enrolled in the program have administrative and judicial remedies. Where there is no program or where special institutional services are required, the state is designated by Congress to fill the gap and provide the services.

We should reiterate a point we made in our opening brief. The state is not geared to provide services to individual children who are engaged in a dispute with a local district. Consider: a) If section 1415 procedures are to be ignored, there is no mechanism for determining what action of the school district would trigger direct services by the state; b) State personnel would presumably be barred from using evaluation material developed by the local district and would have to start from scratch. Precious time would be lost while interviews, testing and evaluation are conducted preliminary to the child's placement; c) The state has no roving teams of professionals who could "ride circuit" and dispense

educational bandaids as they travel around the state. The state would be required to expand its bureaucracy by hiring additional consultants and professionals and to institute procedures for review and approval by other state agencies such as General Services, Finance, the Controller, and the State Personnel Board; d) Assuming the state would be able to hire the necessary personnel, friction between those individuals and local professionals who have spent years with the child would be unavoidable.

Congress, we submit, never intended to have the state displace local school districts. It intended to have the district provide services, either voluntarily or under compulsion. Direct services by the state were to be provided only in the situations described above. Thus the Ninth Circuit was in error in expanding the state's responsibilities with respect to the provision of direct services.

DATED: October 2, 1987

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# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
FILED
APR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION, PETITIONER

*v.*

JOHN DOE, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTIONS PRESENTED

1. Whether the courts below erred in enjoining, pursuant to the "stay-put" provision of the Education of the Handicapped Act, 20 U.S.C. 1415(e)(3), a local school district from indefinitely suspending, pending completion of expulsion proceedings, a child whose handicap-related misconduct endangered himself and others.

2. Whether the Education of the Handicapped Act requires that a state education agency provide direct educational services wherever a local school district is unable or unwilling to provide those services to a particular handicapped child.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-728

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION, PETITIONER

*v.*

JOHN DOE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

The United States distributes federal funds under the Education of the Handicapped Act (EHA), 20 U.S.C. 1400 *et seq.*, and has a substantial interest in questions of federal statutory interpretation, such as the one involved in this case, which will determine, in part, the uses to which those federal funds are put. In addition, under 20 U.S.C. 1234c(e)(2), the Secretary of Education may refer to the Attorney General for enforcement any final cease and desist order directing the withholding of federal funds; thus, the Department of Justice's litigative interests may be affected by the outcome of this case. For similar reasons, the United States participated as amicus curiae before this Court in another case involving the EHA. See *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176 (1982).

## STATEMENT

1. Congress enacted the Education of the Handicapped Act (EHA) (20 U.S.C. 1400 *et seq.*) in 1975 "to assure that all handicapped children have available to them * * * a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children" (20 U.S.C. 1400(c)). Under the EHA, state and local education agencies that comply with extensive statutory goals and procedures receive substantial federal funds to use in the education of handicapped children. At the present time, all states, including the State of California, participate in the EHA program.[1]

At the state level, the EHA requires the pertinent public education authority to demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education" (20 U.S.C. 1412(1)). The state agency must file with, and have approved by, the Secretary of Education, a plan that describes in detail the state's goals, programs, and timetables for educating handicapped children in its jurisdiction. 20 U.S.C. 1412, 1413. The state authority must also show that, to "the maximum extent appropriate," it will educate handicapped children "with children who are not handicapped" (20 U.S.C. 1412(5)). Where, however, "the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," the state agency may provide that handicapped children will receive their "free appropriate public education" in separate classes or institutional settings (*ibid.*).[2]

[1] We are advised by the Department of Education that, for the fiscal year ending September 30, 1986, the State of California received approximately $100.7 million under Part B of the EHA program. The federal grants do not underwrite the total cost of providing appropriate educational services to the approximately 370,000 eligible handicapped children in California; rather, the federal funds supplement state funds that are also earmarked for this purpose. See 20 U.S.C. 1413(a)(9)(B).



At the local level, the EHA requires the pertinent public education authority annually to prepare an "individualized educational program" (IEP) for each handicapped child on its enrollment. 20 U.S.C. 1401(18) and (22). The IEP describes the specially designed instruction and services necessary to meet the unique needs of the particular handicapped child. 20 U.S.C. 1401(19). It is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child himself. See *ibid.* It ensures that the local agency tailors its "free appropriate public education" to each handicapped child's needs. 20 U.S.C. 1414(a)(5).

At both the state and local levels, the EHA requires that various "procedural safeguards" be made available to the parents of handicapped children. 20 U.S.C. 1415(a). Specifically, parents must receive: (a) an opportunity "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child"; (b) prior written notice whenever the responsible education agency proposes (or refuses) to change a child's educational placement or program; (c) a full explanation of their procedural rights as parents; (d) "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"; and (e) an "opportunity for an impartial due process hearing" with respect to any such complaint. 20 U.S.C. 1415(b)(1) and (2). These procedures ensure that interested

[2] See also 34 C.F.R. 300.552 (Comment 1) (1986) ("where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment").

parents can participate effectively in the educational decisionmaking process. See *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 204-205 (1982).

The EHA also requires that "any party aggrieved by the findings and decision" rendered in any such "impartial due process hearing" have appellate recourse. If the initial hearing is held at the local or regional level, the aggrieved party may appeal to the state educational agency. 20 U.S.C. 1415(c). Thereafter, the aggrieved party may "bring a civil action with respect to the complaint • • • in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy" (20 U.S.C. 1415(e)(2)). The court is directed to "receive the records of the administrative proceedings, • • • hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, • • • grant such relief as [it] determines is appropriate" (*ibid.*). The so-called "stay-put" provision of the statute instructs, however, that, "[d]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child • • •" (20 U.S.C. 1415(e)(3)). But see 34 C.F.R. 300.513 (Comment) (1986) ("this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others").

Finally, the EHA requires the state educational agency to provide special education and related services directly to handicapped children in certain circumstances. 20 U.S.C. 1414(d). Specifically, the state agency must provide direct education services to handicapped children wherever it determines (a) that "a local agency • • • is unable or unwilling to establish and maintain" the necessary programs, (b) that a local agency "is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs," or (c) that the state "has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children" (*ibid.*). "The State educational agency may provide such education and services in such manner, and at such locations • • •, as it considers appropriate" (*ibid.*). The Secretary of Education is authorized to withhold federal funds from any state or local education agency that fails its statutory obligations. 20 U.S.C. 1414(b)(2), 1416.



2. a. Respondent John Doe is an emotionally disturbed child with aggressive tendencies in certain circumstances (Pet. App. A3), a condition that renders him "handicapped" within the meaning of the EHA. See 20 U.S.C. 1401(1). In April 1980, respondent Doe entered the Louise Lombard School, a developmental center for handicapped children, pursuant to an IEP prepared for him by the San Francisco Unified School District (SFUSD) (Pet. App. A3). In November 1980, however, respondent Doe assaulted another student and broke a school window (*ibid.*). After respondent Doe admitted doing these acts, the school's principal suspended him for five days, directed that he receive homework assignments, and, after meeting with respondent Doe, his mother, and their attorney, recommended to the school's Student Placement Committee (SPC) that respondent Doe be expelled (*id.* at A3-A4; J.A. 68 n.1, 209). The SPC agreed and notified respondent Doe's mother that it would meet with her, if she wished, on November 25, 1980 to discuss its recommendation to SFUSD (Pet. App. A4). Pursuant to California statute,[3] the SPC continued respondent Doe's suspension indefinitely (*ibid.*).

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[3] Under California law (Cal. Educ. Code § 48911(g) (West Supp. 1987)), a school may extend a student's suspension indefinitely pending resolution of expulsion proceedings "only if the superintendent or the superintendent's designee has determined, following a meeting in which the pupil and the pupil's parent or guardian are invited to participate, that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process." See also Cal. Educ. Code § 48915.5(g) (West Supp. 1987).

By letter, respondent Doe protested that the expulsion hearing should be cancelled and that an IEP team should be convened (Pet. App. A4). SFUSD apparently ignored this request, leading respondent Doe to file this action in federal district court against SFUSD, various SFUSD officials, and petitioner, the California Superintendent of Public Instruction (*ibid.*).[4] Respondent Doe alleged, among other things, that he could not be expelled for his misconduct (since it was a manifestation of his handicap), that the extended suspension pending completion of expulsion proceedings violated the EHA, and that petitioner should intervene and directly provide the educational services that SFUSD had wrongfully ceased providing to him (*id.* at A5-A6).[5] The complaint prayed for declaratory, injunctive, and monetary relief (*id.* at A6).

On November 24, 1980, the day before the scheduled conference, SFUSD cancelled the expulsion proceeding and began providing respondent Doe with home teaching (Pet. App. A4; J.A. 201). On December 2, 1980, the district court issued a temporary restraining order directing SFUSD to readmit respondent Doe to the Louise Lombard School (Pet. App. A4). Then, on December 12, 1980, the court preliminarily enjoined SFUSD from excluding respondent Doe pending efforts to find him an alternative placement (J.A. 63-66). On December 15, 1980, respondent Doe reentered the Louise Lombard School (Pet. App. A4).

b. Respondent Jack Smith, like respondent Doe, is an emotionally disturbed child with aggressive tendencies, rendering him "handicapped" within the meaning of the EHA (Pet. App. A5). In February 1980, an IEP team recommended that he receive, on a trial basis, a special education program in a regular classroom setting at the

[4] At the time respondent Doe filed the suit, Wilson Riles was the California Superintendent of Public Instruction. Petitioner Bill Honig is Mr. Rile's successor in office. See Pet. App. A54.

[5] The complaint alleged causes of action under EHA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and 42 U.S.C. 1983 (Pet. App. A5-A6).



A.P. Giannini School (*ibid.*). Respondent Smith entered that program in September 1980 (*ibid.*). He misbehaved on several occasions,[6] however, and, with his grandparents' consent, was soon reduced to a half-day program (*ibid.*).

On November 14, 1980, respondent Smith made sexual comments to several female students (Pet. App. A5). After respondent Smith admitted doing these acts, the school's principal suspended him for five days and recommended to the SPC that respondent Smith be expelled (*ibid.*). The SPC concurred and notified respondent Smith's grandparents that it would meet with them, if they wished, on December 2, 1980, to discuss the matter (*ibid.*). The SPC continued respondent Smith's suspension indefinitely pending resolution of the expulsion proceeding, again pursuant to California law (*ibid.*).

By letter, respondent Smith protested to SPC that its actions were improper (Pet. App. A5). On December 1, 1980, SPC cancelled the proposed meeting and offered either to return respondent Smith to the half-day program at A.P. Giannini School or to provide him with home tutoring; it would not, however, return him to the full-day program (*ibid.*). Respondent Smith chose the home tutoring, which commenced on December 10, 1980 (*ibid.*). He then became aware of, and successfully petitioned for leave to intervene in, respondent Doe's suit (*ibid.*), joining respondent Doe's allegations and demanding that he be returned to the full-day program at A.P. Giannini School (*id.* at A5-A6).

3. In a series of orders, the district court granted respondents' prayers for relief, albeit only in part (Pet. App. A40-A45, A46-A52, A53-A59). On May 25, 1982, the court held that the Eleventh Amendment barred recovery of damages from petitioner, but not from SFUSD or SFUSD officials (*id.* at A6; J.A. 182-197). On June 17, 1983, the court granted partial summary judgment to

[6] This misbehavior included acts of theft, extortion, pulling a fire alarm, and making sexual remarks to female students (J.A. 149, 152, 211).

respondents and awarded declaratory and injunctive relief (J.A. 217-230). The court concluded that "the balance of hardships tips decidedly in favor of [respondents]," reasoning that, while "the hardships to defendant and the public interest in maintaining a safe and secure school environment are not insubstantial, these hardships and interests must be viewed in light of the strong national policy expressed in the EHA * * * [that] the loss of even a short period of appropriate educational services can cause immeasurable damage to a handicapped child" and that Congress has mandated that the school "provide alternative arrangements within a current placement until an appropriate placement is found or agreement is reached with [respondents'] guardians" (J.A. 224-225). See also J.A. 221.

Accordingly, on December 2, 1983, the court entered a sweeping order barring SFUSD and its various officials from, among other things: (a) taking any disciplinary action other than a two-day or five-day suspension against a handicapped student for handicap-related misconduct; (b) failing to convene a multidisciplinary team within five days of proposing to change a handicapped student's placement because of misconduct; (c) making an IEP decision on anything other than a majority-rule basis; or (d) effecting any change in a handicapped student's placement without parental consent during the pendency of the EHA proceedings. Pet. App. A40-A45. The court also required SFUSD and its officials to pay damages of $1600 to each respondent, pursuant to a settlement agreement negotiated by the parties. See *id.* at A40. Finally, on April 23, 1984, the court entered a similarly sweeping order against petitioner, providing identical declaratory and injunctive relief (*id.* at A46-A52), and, in addition, holding that petitioner must "provide services directly when, in any individual case, [he] determine[s] that a local education agency is unable or unwilling to establish and maintain programs of free appropriate public education" (*id.* at A51).



4. The Ninth Circuit affirmed in part, reversed in part, and modified in part (Pet. App. A1-A39). It disagreed with the district court's ruling "that handicapped children may not have their programs reduced, or be subjected to any other disciplinary measures save the two- and five-day suspensions * * *, for conduct that is a manifestation of their handicaps" (*id.* at A17), finding that suspensions for fixed periods up to 30 days do not amount "to either a change in placement or the deprivation of an appropriate public education" (*id.* at A18). It further found the district court's rulings that "an IEP team must convene within five days of the education agency's decision to seek a handicapped pupil's expulsion for misconduct," and that an IEP team's "decision[] shall be made by majority rule," were unsupported by the statute (*id.* at A24-A25, A26). But it agreed that petitioner and the other defendants must be enjoined from changing the current educational placement of any handicapped student without parental consent during the pendency of EHA proceedings (*id.* at A19-A21) and that petitioner must provide direct educational services wherever, as here, a local school district is unable or unwilling to provide such services to a particular handicapped child (*id.* at A31-A33).[7]

On the interim placement issue, the court noted (Pet. App. A19) that the EHA's "'stay put' provision, 20 U.S.C. 1415(e)(3) * * *, provides that '[d]uring the pendency of any [review under the EHA], unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of such child * * *.'" The court indicated that it was "sympathetic" with the reasoning of courts holding that the "stay-put" provision does not prevent a school from altering a handicapped student's

[7] The court based its rulings on the EHA, finding that, under this Court's decision in *Smith* v. *Robinson*, 468 U.S. 992 (1984), EHA is the exclusive remedy for claims of discrimination against handicapped children. Pet. App. A8.

placement when he endangers himself or others (Pet. App. A20, citing *Jackson* v. *Franklin County Sch. Bd.*, 765 F.2d 535, 538 (5th Cir. 1985); *S-1* v. *Turlington*, 635 F.2d 342, 348 n.9 (5th Cir.), cert. denied, 454 U.S. 1030 (1981)). But it nevertheless concluded that "section 1415(e)(3) does not list any exceptions to its automatic injunction" and therefore that, in this respect, the district court's award of declaratory and injunctive relief must be affirmed (Pet. App. A21). The court added that "[t]his limitation does not leave educators helpless," since "[t]hey have recourse to the gamut of lesser disciplinary measures and program variations that do not rise to the level of changes of placement" and since, "in extraordinary circumstances[,] [they may] seek judicial relief should existing procedures prove inadequate to cope with truly exigent circumstances" (*ibid.*).

On the direct educational services issue, the court rejected petitioner's argument that 20 U.S.C. 1414(d) "requires it to provide service directly, not in individual instances of local inaction, but only when localities maintain no programs of special education whatsoever" (Pet. App. A31-A32). It noted (*id.* A32 (emphasis in original)) that 20 U.S.C. 1414(d)(3) "specifically requires direct action when a local education agency 'has *one or more* handicapped children who can best be served by a regional or State center designed to meet the needs of such children,'" and it found it "incontrovertable that, whenever the local agency refuses or wrongfully neglects to provide a handicapped child with a free appropriate education, that child 'can best be served' on the regional or state level" (Pet. App. A32). The court added, however, that a state is "obliged to intervene directly in an individual case [only where] * * * [t]he breach [is] significant (as in this case)," where "the child's parents or guardian [have] give[n] the responsible state officials adequate notice of the local agency's noncompliance, and [where] the state [has] be[en] afforded a reasonable opportunity to compel local compliance" (*id.* at A32-A33).



## SUMMARY OF ARGUMENT

1. The court of appeals' conclusion that the "stay-put" provision is an "automatic injunction" that must issue in all but the most extraordinary circumstances is contrary to well-established principles of equity jurisprudence. This Court has long recognized that the grant of jurisdiction to ensure compliance with a statute does not obligate a federal judge sitting as a chancellor in equity to grant an injunction for every violation of law. To the contrary, except where the purpose, structure, and legislative history of a statute clearly indicate an intent on the part of Congress to foreclose the exercise of equitable discretion, the Court has said that equitable relief is available only where there is irreparable injury, inadequate alternative remedies, and a balance of equities that favors issuance of such relief. See *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

Here, the EHA's purpose, structure and legislative history in fact indicate that Congress envisioned a remedial framework in which competing interests may be reconciled by a court of equity. The EHA's overall substantive objective is the provision of a "free appropriate public education" to handicapped children. The "stay-put" provision is a means of promoting this objective, and equitable enforcement of the "stay-put" provision is only sometimes necessary to insure that this substantive policy objective is achieved. Moreover, the EHA's general remedial provision confers broad discretion on courts to grant relief that is "apropriate" in light of the statute's substantive purpose. Congress did not indicate that it intended to except from this broad grant of discretion cases seeking equitable enforcement of the "stay-put" provision. To the contrary, the legislative history indicates that Congress envisioned a "flexible approach" that would meet the needs of both the child and the states, which is precisely what the exercise of equitable discretion provides.

The district court here abused its equitable discretion when it enjoined a local school district from indefinitely suspending, pending completion of expulsion proceedings, two children whose handicap-related misconduct endangered themselves and others. No irreparable injury was shown to result from the change in placement. The bare denial of the instrumental right to stay in a current placement does not constitute such an injury. In general, a change in placement arising from a child's endangering behavior is not sufficiently likely to undermine the statute's substantive objective of providing a "free appropriate public education" to justify injunctive or declaratory relief. A child's violent behavior is one indication that his current placement is not appropriate. Moreover, due process hearings, interim placement, and restitution are adequate remedies in these circumstances and, in any event, the balance of equities weighs against issuance of equitable relief. The responsibility of state and local governments properly to educate their students would be irreparably undermined if they had to keep a child whose handicap-related misconduct endangers others in his current placement.

2. The court below further erred in requiring petitioner to provide direct educational services wherever a local school is unable or unwilling to provide those services to a particular handicapped child. The EHA contemplates that local school districts, not the state, will prepare a child's IEP and provide the necessary educational services. The state agency is required to provide direct educational services only in limited circumstances, and these circumstances do not include situations in which the local school is simply unable or unwilling to provide those services to a particular child. In such circumstances, the child's best interests are served by requiring the local education agency, not the state education agency, to provide the required services.



## ARGUMENT

### I. THE COURT BELOW ERRED IN ENJOINING THE SCHOOL DISTRICT FROM INDEFINITELY SUSPENDING RESPONDENTS

The courts below declared that the indefinite suspension, pending completion of expulsion proceedings, of a child whose handicap-related misconduct endangers himself or others violates the "stay-put" provision of the EHA and therefore must be enjoined. See Pet. App. A19-A21; J.A. 221, 224-225. This "stay-put" provision (20 U.S.C. 1415(e)(3)) states, in pertinent part, that:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child * * *.

We frankly doubt that Congress intended this provision to apply in circumstances where a child's handicap-related misconduct endangers himself or others (see 34 C.F.R. 300.513 (Comment) (1986)). Such a rigid rule could defeat the very protections for the handicapped that Congress intended the EHA to create, by discouraging the placement of handicapped children in the least restrictive environment, if there is any perceived risk of dangerous conduct. But the Court need not and should not decide this issue here. Regardless of the "stay-put" provision's applicability in such circumstances, the declaratory and injunctive relief ordered by the district court, and approved by the court of appeals, is plainly inappropriate and, on this basis alone, the judgment of court below should be reversed.

#### A. The "Stay-Put" Provision Does Not Deny Courts Their Traditional Equitable Discretion With Respect To The Issuance Of Declaratory And Injunctive Relief

Though it gave lip-service to the balancing of the parties' hardships (see J.A. 63-66, 224), the district court in this case treated the "stay-put" provision as a con-

gressional mandate calling for issuance of declaratory and injunctive relief in any circumstance in which that provision is violated. See J.A. 224-225. In summarily affirming this aspect of the district court's order, the court of appeals even more bluntly held that the "stay-put" provision is an "automatic injunction" that must issue in all but the most "extraordinary circumstances." See Pet. App. A21. These analyses confuse the *right* arguably granted to handicapped children by the "stay-put" provision with the *remedies* that should be used to enforce it.

1. This Court has long recognized that equitable remedies (such as injunctive and declaratory relief) should not issue as a matter of course. *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982); *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948). Rather, it has admonished that such remedies "should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable" (*Cavanaugh* v. *Looney*, 248 U.S. 453, 456 (1919)). It has thus repeatedly stated that the basis for issuing equitable relief "is irreparable injury and inadequacy of legal remedies" and that "'[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances'"; "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law" (*Amoco Production Co.*, slip op. 9 (citation omitted)).

Of course, "Congress may intervene and guide or control the exercise of the courts' discretion" (*Weinberger* v. *Romero-Barcelo*, 456 U.S. at 313). Thus, in *TVA* v. *Hill*, 437 U.S. 153 (1978), the Court found that the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, required a district court to enjoin completion of the Tellico Dam in order to preserve the snail darter, reasoning that the statute creates a flat ban on the destruction of critical habitats and that the principal objective of that statute,



as opposed to the bare fact of a statutory violation, could be vindicated only by the issuance of an injunction. But, in cases following *Hill*, the Court has emphasized that it will "not lightly assume that Congress has intended to depart from established [equity] principles" (*Weinberger* v. *Romero-Barcelo*, 456 U.S. at 313). See also *Amoco Production Co.*, slip op. 9-10. Thus, where injunctive and declaratory relief are not absolutely necessary to vindicate the substantive objectives of a particular statute, the Court has said that a statute will not be read to foreclose the exercise of traditional equitable discretion.

For example, in *Weinberger* v. *Romero-Barcelo*, *supra*, the Court held that, even though Section 301(a) of the Federal Water Pollution Control Act (FWPCA) states that "the discharge of any pollutant by any person [without a permit] shall be unlawful" (33 U.S.C. 1311(a)), a district court had appropriately refused to enjoin the Navy from so violating the statute (by discharging ordnance into the sea without a permit). The Court noted that "[t]he integrity of the Nation's waters, * * * not the permit process, is the purpose of the FWPCA" (456 U.S. at 314), and that the issuance of equitable relief was not necessary to vindicate either "the purpose [or] function of the permit system"—*i.e.*, the integrity of the Nation's waters (*id.* at 315). The Court further noted that other remedies, such as fines and criminal penalties, were available to enforce the permit requirement itself (*id.* at 314) and that the statute's overall scheme and legislative history contemplated the exercise of discretion and balancing of equities (*id.* at 315-319). Accordingly, the Court refused to "read the FWPCA as foreclosing completely the exercise of the court's discretion," and reversed an appellate decision ordering a district court to enjoin a violation of the permit requirement (*id.* at 320).

More recently, in *Amoco Production Co.* v. *Gambell*, *supra*, the Court held that, even though Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA) provides that no lease of land of Alaskan Natives "shall be effected until the head of [the] Federal agency [having primary jurisdiction over such lands]"

gives appropriate notice, conducts a statutorily required hearing, and determines that the restriction of subsistence uses on land of Alaskan Natives is necessary (16 U.S.C. 3120), a district court had appropriately refused to enjoin the Secretary of Interior from granting certain oil and gas leases to several oil companies notwithstanding his failure to comply with Section 810's provisions. The Court noted that Section 810's procedural requirements are designed only "to protect Alaskan subsistence resources from unnecessary destruction" (*Amoco Production Co.*, slip op. 11) and that "there is no clear indication in [Section] 810 that Congress intended to deny federal district courts their traditional equitable discretion in enforcing the provision" (*ibid.*). Moreover, it found that the court of appeals' presumption that "irreparable damage" would occur if the Secretary's action was not enjoined was "contrary to traditional equitable principles and had no basis in ANILCA" (*id.* at 12), noting that, while the statute "expressly declared that preservation of subsistence resources is *a* public interest," Congress "established a framework for reconciliation, where possible, of competing public interests" (*id.* at 13). Accordingly, the Court held that the court of appeals had "erred in directing the issuance of a preliminary injunction" to enforce the environmental impact analysis process (*ibid.*).

2. Here, as in *Romero-Barcelo* and *Amoco Production Co.*, there is no basis for concluding, as the court of appeals did, that the "stay put" provision amounts to an "automatic injunction," such that the district court's injunctive and declaratory relief could be affirmed without any balancing of equities. Assuming *arguendo* that the literal language of 20 U.S.C. 1415(e)(3) gives even a child whose handicap-related misconduct endangers himself or others a right to have his current placement maintained pending the completion of expulsion proceedings, neither the existence of this right nor the statutory language creating it addresses the distinct and separate issue whether it is appropriate for a district court to enjoin or declare unlawful a particular violation of the "stay-



put" provision. Rather, as in *Romero-Barcelo* and *Amoco Production Co.*, the EHA's overall objective, its structure, and its legislative history indicate that Congress envisioned a remedial framework in which competing interests are reconciled by a court of equity.

The EHA's overall objective is "to assure that all handicapped children have available to them • • • a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, [and] to assist States and localities to provide for the education of all handicapped children" (20 U.S.C. 1400(c)). The "stay-put" provision exists to promote this substantive policy objective. But, as with the permit requirement in FWPCA and the environmental impact analysis requirement in ANILCA, the "stay-put" requirement is simply a means for effecting the substantive policy objective of the statute—the provision of a "free appropriate public education." It should be enforced in a manner that furthers that objective. See *Burlington Sch. Comm.* v. *Massachusetts Dep't of Educ.*, 471 U.S. 359, 371-374 (1985) (notwithstanding the literal language of 20 U.S.C. 1415(e)(3), parents may unilaterally change placement of child and recover reimbursement for expenses incurred if the original placement is ultimately found inappropriate). Such enforcement is best achieved by allowing case-by-case consideration of whether the extraordinary remedies of declaratory and injunctive relief should be granted or withheld. See generally *Weinberger* v. *Romero-Barcelo*, 456 U.S. at 314; *Amoco Production Co.*, slip op. 11. Thus, even if the school's actions violated the statute, the language of the stay-put provision is best understood as allowing the court's traditional balancing of equities in determining a remedy.

The statute's general remedial provision reinforces this conclusion. That provision, which immediately precedes the "stay-put" provision in the statutory scheme, states that the court is authorized to "grant such relief as [it] determines is appropriate" (20 U.S.C. 1415(e)(2)).

This Court has said that "these words confer broad discretion on the court," requiring only that "the relief is to be 'appropriate' in light of the purpose of the Act" (*Burlington Sch. Comm.*, 471 U.S. at 369). Congress did not indicate that this broad discretion is inappropriate in the context of the stay-put provision.

The legislative history of the EHA also supports the exercise of equitable discretion in the decision whether to enjoin or declare unlawful violations of the "stay-put" provision. Congress "favor[ed] a proper interim placement pending the resolution of disagreements over the IEP" (*Burlington Sch. Comm.*, 471 U.S. at 373). "The conferees [were] cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. [They] did feel, however, that the placement, or change in placement, should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus[,] the conference adopted a flexible approach to try to meet the needs of both the child and the State." 121 Cong. Rec. 37412 (1975) (Sen. Stafford).[8] This desire to maintain a "flexible approach to try to meet the needs of both the child and the State" makes clear that Congress did not intend to curb the traditional authority of the federal courts, once a violation has been established, to fashion a remedy that is responsive to the equities of the particular case at hand. To the extent the courts below concluded to the contrary, they were clearly wrong.[9]

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[8] The remaining legislative history merely restates the statutory requirement. See S. Conf. Rep. 94-455, 94th Cong., 1st Sess. 50 (1975); H.R. Conf. Rep. 94-664, 94th Cong., 1st Sess. 50 (1975); 121 Cong. Rec. 37416 (1975) (Sen. Williams).

[9] This error is not adequately tempered, as the court below sought to do (Pet. App. A21), by allowing "educational agencies in extraordinary circumstances [to] seek judicial relief should existing procedures prove inadequate to cope with truly exigent circumstances." Cf. *Doe* v. *Brookline Sch. Comm.*, 722 F.2d 910, 917-919 (1st Cir. 1983) (suggesting that burden of proving that equitable relief is inappropriate should be placed on school officials). This approach suggests that, prior to the culmination of administrative proceedings, the FHA authorizes a court to entertain a cause-of-action by a school district seeking assurances that its actions will not violate the EHA. The statutory language, however, suggests that all parties must exhaust administrative remedies prior to seeking judicial review, whether for declaratory relief or otherwise. See 20 U.S.C. 1415(e)(2); *Smith* v. *Robinson*, 468 U.S. 992, 1010-1011 (1984). This approach is also inconsistent with the EHA's requirement that "appropriate" placement issues be decided initially by local and state education authorities, with the participation of parents, in the IEP process and, if necessary, in the elaborate impartial due process hearing procedure created by the statute. Indeed, the court of appeals' approach presumes, contrary to this Court's admonitions, that a court should hold expedited hearings and make interim decisions concerning a student's appropriate placement. In practice, the district court will not have a fully developed administrative record or sufficient expertise to make the delicate special education decisions required for "appropriate" placement of handicapped childrens (see *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. at 206-209; *Smith* v. *Robinson*, 468 U.S. at 1010-1011), and cannot act with sufficient speed and accuracy to prevent a possibly dangerous child from doing harm to himself or others. See *Jackson* v. *Franklin County Sch. Bd.*, 765 F.2d 535, 538 (5th Cir. 1985).



**B. The District Court Abused Its Equitable Discretion When It Enjoined A Local School District From Indefinitely Suspending, Pending Completion Of Expulsion Proceedings, Children Whose Handicap-Related Misconduct Endangered Themselves Or Others**

Of course, a court's traditional equitable discretion is quite broad and the issuance of declaratory or injunctive relief may be reversed only if that discretion has been abused. See *Burlington Sch. Comm.*, 471 U.S. at 369; see generally *Doran* v. *Salem, Inc.*, 422 U.S. 931, 932 (1975). As noted above, however, this Court has said that equitable relief may not issue where there has been no irreparable injury or alternative remedies are adequate (*Weinberger* v. *Romero-Barcelo*, 456 U.S. at 311-313; *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 59-65 (1975)), and, in any event, that "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" (*Amoco Production Co.*, slip op. 9). See also

*Yakus* v. *United States*, 321 U.S. 414, 440 (1944). Viewed in these terms, the issuance of declaratory and injunctive relief in this case—where maintaining a handicapped child's current placement endangers others—constituted an abuse of equitable discretion.[10]

1. Respondents have not demonstrated the irreparable injury that is necessary to invoke a court's equitable powers. That injury does not follow from the mere denial of a statutory right. See pages 16-18, *supra*. Nor can the necessary irreparable injury be "presumed" from the change in placement itself. As this Court noted in *Amoco Production Co.*, a presumption of irreparable injury "is contrary to traditional equitable principles * * *" (slip op. 12). Accord, *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 58-63 (irreparable injury may not be presumed from delay in filing forms required by the Williams Act). Thus, in *Amoco Production Co.*, the Court refused to presume that irreparable injury to the environment had occurred where the Secretary of Interior allowed certain oil companies to begin exploration activities on federally protected lands even though he had not conducted a statutorily required-environmental impact assessment. Rather, the Court said, a court must determine, on the basis of facts presented at trial, whether the violation of a procedural requirement "is sufficiently likely" to undermine the substantive policy objective of the statute absent the issuance of the requested injunction. *Amoco Production Co.*, slip op. 12.

In this case, there has been no sufficient showing that the failure to leave a dangerous child in his present placement is likely to undermine the substantive objective that the "stay put" provision is intended to advance—the provision of a "free appropriate public education" to the handicapped child. Without discussing the issue of what placement might ultimately be found appropriate for respondents, and thus without confronting the question

[10] Our discussion of "dangerous" children concerns only those handicapped students who pose a tangible threat to other persons, not children whose behavior is merely unruly or disruptive.



of what substantive opportunities they were being denied that they were in fact entitled to receive, the district court gave controlling significance to the literal language of the "stay-put" provision (J.A. 64-65, 224-225). The court of appeals, in giving force to the "automatic injunction" of Section 1415(e)(3) without any discussion of equities, even more clearly found an identity between a change in placement and a right to injunctive and declaratory relief. Pet. App. A21. These rulings are in error.

The EHA specifically contemplates that a child's current placement may be changed for good reason. It provides that current placements must be monitored and revised as necessary in view of the changing needs of the student. See 20 U.S.C. 1413(a)(11), 1414(a)(5). Sound educational policy is reflected in the statute's general presumption in favor of continuity and avoidance of unnecessary dislocation in the child's educational environment. *Doe* v. *Brookline Sch. Comm.*, 722 F.2d at 915. But where the child has become a threat to the safety of others by engaging in violent conduct, that continuity has already been interrupted. Further, the EHA and its regulations recognize that the child's conduct is a sure indication that the current educational placement is no longer appropriate for him.[11] Thus, where a dangerous child is involved, a mere change in placement is not sufficiently likely to undermine the provision of a "free appropriate public education." Accord *Burlington Sch. Comm.*, 471 U.S. at 371-374 (child is not irreparably harmed by parents' unilateral change in his placement).

[11] Cf. 20 U.S.C. 1412(5)(B) (emphasis added) ("special classes, separate schooling, or *other removal* of handicapped children from the regular educational environment [may] occur[] * * * when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily"); 34 C.F.R. 300.552 (Comment 1) (1986) (" 'where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment' ").

2. Of course, even if the necessary "irreparable injury" were sufficiently likely to occur, adequate alternative remedies (such that declaratory and injunctive relief should not issue) are often available to a child who is removed from his current educational setting because he constitutes a threat to himself or others. The courts below erred in failing to examine these alternatives.

To begin with, no child, handicapped or otherwise, may be suspended for misconduct without receiving at least a "rudimentary" due process hearing to establish that he in fact engaged in the alleged misconduct. See *Goss* v. *Lopez*, 419 U.S. 565, 581 (1975). This due process hearing ensures that the child is not subjected to arbitrary or capricious action by school officials.

Second, since the statute requires the provision of a free appropriate public education to all handicapped children, a school that changes the current placement of a child pending the completion of EHA proceedings because of handicap-related misconduct that endangers others has a continuing obligation to provide that child with other appropriate interim educational services. In a particular case, an appropriate interim placement might be a smaller class (with greater supervision), home tutoring, or some type of private educational service. The adequacy of the alternative placement may, of course, itself be challenged in the "impartial due process hearing," the state review process, and, ultimately, in court. See 20 U.S.C. 1415(b)(1)(E), (b)(2), (c) and (e)(2).[12]

[12] Respondents Doe and Smith filed this federal court action without exhausting these administrative remedies. Ordinarily, the failure to exhaust these administrative remedies would make the action premature for judicial review. See 20 U.S.C. 1415(e)(2); see also *Timms* v. *Metropolitan Sch. Dist.*, 722 F.2d 1310, 1316-1317 (7th Cir. 1983); *Riley* v. *Ambach*, 668 F.2d 635, 640 (2d Cir. 1981). The school district, however, apparently ignored respondents' initial requests that EHA proceedings be initiated and arguably was dilatory in providing interim placements to respondents once the EHA proceedings were in fact initiated. See Pet. App. A4, A5. In these circumstances, it would have been futile for respondents to resort to the administrative process and, accordingly, we do not quarrel with the assumption of jurisdiction over this matter by the courts below. See *Christopher T.* v. *San Francisco Unified Sch. Dist.*, 553 F. Supp. 1107 (N.D.Cal. 1982).



Finally, as this Court noted in *Burlington Sch. Comm.* v. *Massachusetts Dep't of Educ.*, *supra*, if the child's parents should determine that the proposed interim placement does not provide the child with the educational services that they believe are statutorily appropriate, they may unilaterally obtain an appropriate placement at their own expense and, at the culmination of the EHA proceedings, seek restitution from the erring school district. See slip op. 12-14. Thus, both parties have a financial incentive to insist on the appropriate placement for the child.

3. Even if these alternative remedies were inadequate in a particular case, however, the balance of equities would still weigh against issuance of injunctive or declaratory relief wherever a child poses a significant danger to himself or others. A child who poses a significant threat of serious harm cannot be accommodated in a setting with other students. Interim measures a school may take to protect other students from sudden dangerous conduct (by, for example, assigning a full-time attendant to the student) may not be effective to prevent harm and may not prevent other adverse educational consequences to the student or others in the classroom.[13] Indeed, the interim measures that the school might adopt to protect the student's classmates and teachers might themselves be substantially inconsistent with provision of an adequate education to the student or others. Nothing in the EHA suggests that Congress intended to forbid the consideration of these concerns by courts, thus leading to the conclusion that equitable relief should not issue in cases involving dangerous students. Note, *Enforcing the Right to an "Appropriate" Education*, 92 Harv. L. Rev. 1121-1124 (1978); cf. *Amoco Production Co.*, slip op. 13

[13] It appears, in any event, that such action could constitute a change in "related services," which would amount to a change in placement under the EHA. 20 U.S.C. 1401(16) and (19).

(public interest in enforcing federal environmental statutes is not so important that it automatically outweighs other public interests).[14] Nor did the EHA intend that school districts confronted with a dangerous student be required to maintain him in a classroom with other students; the EHA contemplates that schools will retain sufficient discretion to maintain a safe and effective educational environment for all students. See *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. at 207, 209.

Accordingly, other courts of appeals have held that a local school district should not be enjoined from changing the current placement of a child whose handicap-related misconduct endangers himself or others. For example, in *Jackson* v. *Franklin County Sch. Bd.*, 765 F.2d 535, 538 (1985), the Fifth Circuit affirmed a district court ruling that a male handicapped student who had engaged in sexual misconduct with a female student was not entitled to remain in public school pending resolution of EHA proceedings. The court reasoned that "section 1415(e)(3) does not bar a court from exercising its traditional equity powers to modify the placement of a handicapped child during the pendency of his IEP appeal," and that, in exercising this authority, courts must recognize that "public schools unquestionably retain their authority to remove any student, handicapped or otherwise, who disrupts the educational process or poses a threat to a safe school environment." Likewise, in *Victoria L. by Carol A.* v.

[14] Moreover, requiring schools to maintain such children in their current placement will create a substantial disincentive to the placement of handicapped children with non-handicapped children in the first instance. School officials who realize that they will be required to retain handicapped students in their current placement, regardless of how harmful those students' subsequent behavior proves to be, will tend initially to place handicapped students in the most isolated, as opposed to the least restrictive, environment. School officials will, for example, be less likely to adopt "conditional" placements in regular school settings, such as that initially established for respondent Smith in this case. See Pet. App. A5. Such incentives obviously are antithetical to the voluntary, nonadversarial educational decisionmaking process that lies at the heart of the EHA scheme. See 20 U.S.C. 1412(5)(B), 1414(a)(1)(C)(iv).



*District Sch. Bd.*, 741 F.2d 369, 374 (1984), the Eleventh Circuit held that a handicapped student, who, among other things, brought a razor blade and a martial arts weapon to school, and threatened to injure and kill another student, could be excluded during the pendency of EHA proceedings; the court noted that "Congress had no intent to deprive local school boards of their traditional authority and responsibility to insure a safe school environment," and that changing the placement of a dangerous handicapped student pending the resolution of the EHA proceedings is a "proper[] exercise[] [of] the traditional disciplinary authority that [schools] retain[] under the EHA." See also *Stacey G.* v. *Pasadena Independent Sch. Dist.*, 695 F.2d 949, 955 & n.5 (5th Cir. 1983); *S-1* v. *Turlington*, 635 F.2d 342, 348 & n.9 (5th Cir.), cert. denied, 454 U.S. 1030 (1981); 34 C.F.R. 300.513 (Comment) ("While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others."); but cf. *Doe* v. *Brookline Sch. Comm.*, 722 F.2d at 917-919. These decisions reflect the *only* sensible balancing of the equities at issue in such cases. Accordingly, we believe that the courts below abused their equitable discretion in requiring petitioner and the other defendants to put respondents back in their current educational placements.

## II. THE EDUCATION OF THE HANDICAPPED ACT DOES NOT REQUIRE THAT A STATE EDUCATION AGENCY PROVIDE DIRECT EDUCATIONAL SERVICES WHEREVER A LOCAL SCHOOL DISTRICT IS UNABLE OR UNWILLING TO PROVIDE THOSE SERVICES TO A PARTICULAR HANDICAPPED CHILD

The court below also held (Pet. App. A31-A32) that EHA requires a state educational agency (such as petitioner) to provide direct educational services wherever a local school district (such as SFUSD) is unable or unwilling to provide those services to a particular handi-

capped child. The EHA does not contain any such requirement.

The EHA assumes that most handicapped children will receive their education from local school districts. The state is responsible, under the EHA, for creating and overseeing implementation of a plan that establishes statewide goals, programs, and timetables under which handicapped children will be educated. See 20 U.S.C. 1412, 1413.[15] The local school districts, by contrast, are responsible for preparing a child's annual IEP—the *modus operandi* of the statute—and for making the necessary educational services available. See 20 U.S.C. 1401(18), (19) and (22). Congress believed that "the State should remain ultimately responsible and accountable * * * for the attainment of the goal of educating all handicapped children," but that "the role of the local educational districts as providers of direct services [would be] paramount" (121 Cong. Rec. 37410 (1975) (remarks of Senator Randolph)). See also S. Conf. Rep. 94-455, *supra*, at 44 ("The Conferees note that the local educational agency has the major responsibility in providing direct services to handicapped children.").

This allocation of responsibility is indispensable to the achievement of the purposes of the Act. One of Congress' principal reasons for enacting the EHA was to insure that handicapped children receive education "to the maximum extent appropriate * * * with children who are not handicapped." 20 U.S.C. 1412(5). The placement of handicapped children in the least restrictive environ-

[15] The EHA gives the state agency general supervisory responsibility (20 U.S.C. 1412(6)), directs it to establish and maintain a system to guarantee procedural safeguards with respect to the provision of a free appropriate public education by local education agencies (20 U.S.C. 1415(a)), to establish an administrative complaint resolution procedure (20 U.S.C. 1415(b) and (c)), to review and approve local agency plans before granting federal money to those agencies (20 U.S.C. 1414(b)(1)), and to cease providing EHA funds to local agencies that do not comply with the statute (20 U.S.C. 1414(b)(2)).



ment cannot occur unless local school districts act as the major providers of direct services.

To be sure, the EHA does require the state educational agency to provide direct educational services in a few limited circumstances. In enacting the EHA, Congress underscored that some school districts would be too small to establish programs of sufficient size and scope (H.R. Rep. 94-332, 94th Cong., 1st Sess. 17-18 (1975)), and that some severely handicapped children would need services that, economically speaking, could only be provided on a state or regional basis (S. Conf. Rep. 94-455, *supra*, at 45). Thus, it enacted 20 U.S.C. 1414(d), which provides, in pertinent part, that:

> Whenever a State educational agency determines that a local educational agency—
>
> (1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;
>
> (2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or
>
> (3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;
>
> the State educational agency shall use the payments which would have been available to such local educational agency to provide * * * services directly to handicapped children residing in the area served by such local educational agency.

But none of 20 U.S.C. 1414(d)'s provisions require a state agency to provide direct educational services just because a local school district is unable or unwilling to provide those services to a particular handicapped child.

Specifically, 20 U.S.C. 1414(d)(1) applies where a local agency is "unable or unwilling to establish and maintain *programs* of free appropriate public education" (empha-

sis added). Thus, it plainly concerns only situations in which the local agency has failed to provide services to handicapped children generally, not where it has failed to provide services to a particular child. Similarly, 20 U.S.C. 1414(d)(2) applies where a local agency is "unable or unwilling to be consolidated * * * in order to establish * * * *programs*" (emphasis added). Again, the provision clearly concerns situations in which there is a systemic, rather than a particular, failure of the local agency to provide services. Only 20 U.S.C. 1414(d)(3) requires the state to take direct action in individual cases. But that obligation arises only where a child would be "best served at a State or regional center," and it is not, as the court below suggested (Pet. App. A32), "incontrovertible that, whenever the local agency refuses or wrongfully neglects to provide a handicapped child with a free appropriate education, that child 'can best be served' on the regional or state level." [16] To the contrary, where the local agency has services appropriate to the child's educational needs, and the local agency wrongfully refuses to serve that child, the child is "best served" by compelling the local agency to provide those services. The statutory violation would only be compounded by concluding, prior to the statutorily required

[16] The cases cited by the court below (Pet. App. A32) do not support its construction of 20 U.S.C. 1414(d). *Kruelle* v. *New Castle County Sch. Dist.*, 642 F.2d 687, 697 (3d Cir. 1981), and *S-1* v. *Turlington*, 635 F.2d at 350, involved interpretations of 20 U.S.C. 1412(6), not 20 U.S.C. 1414(d), and did not in fact require a state to provide direct services to any particular handicapped child. *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 511 F. Supp. 1263, 1278 (N.D. Ga. 1981), aff'd, 716 F.2d 1565 (11th Cir. 1983), vacated on other grounds, 468 U.S. 1213 (1984), cert. denied, 469 U.S. 1228 (1985), did involve 20 U.S.C. 1414(d) (as well as 20 U.S.C. 1412(6)), and did admonish that a state must "make sure that local agencies provide adequate services to handicapped children, or * * * provide directly such services," but did not suggest that the state must provide those services in every situation in which a local agency has failed to provide services to a particular child.



consideration of the individual child's educational needs, that a child should not be served by the local education agency.[17]

This interpretation of 20 U.S.C. 1414(d)(3) does not, as respondents suggest (Br. in Opp. 14), allow handicapped children to fall in a "no man's land" for which neither the state nor the local agency will claim responsibility. Under its general supervisory authority (20 U.S.C. 1412(6)), the state agency is required to take necessary action to assure that local agencies comply with the EHA, including any remedies available under State law to force compliance. The district court was correct in assessing state responsibility for ensuring a free appropriate public education. Where the district court erred, however, was in determining that the appropriate remedy in this case was to require the State to provide these services directly. Wherever a local agency refuses to provide desired services, a child's parents should file a complaint with the state. 20 U.S.C. 1415(b)(2), 1415(c). If the state determines that such services should have been provided, it must direct the local agency to provide them. If the local agency persists in its refusal, the state must compel the local agency to fulfill its responsibilities. 20 U.S.C. 1412(6). And if both the local agency and the state fail to satisfy their responsibilities, the child's parents may seek "appropriate" relief from a state or federal court (20 U.S.C. 1415(e)(2)) or from

[17] This flaw is not cured, as the court below suggested (Pet. App. A32-A33), by limiting a state's responsibility to provide such direct services to circumstances in which the local agency's breach is "significant," the state agency has received notice of it, and the state has a reasonable opportunity to compel local compliance. Putting aside the fact that these limitations have absolutely no nexus to the statute (and thus highlight the essentially legislative process in which the court below was engaged), the limitations do not change the fact that, because of the court order, the state will be placing the handicapped child in a center that is not best suited to the child's particular needs.

the Secretary of Education (20 U.S.C. 1416(a)). In short, the statutory scheme adequately ensures that handicapped children will receive the educational services to which they are entitled.

## CONCLUSION

The judgment of the court of appeals should be reversed in relevant part.

Respectfully submitted.

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APRIL 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181493 40324

# AMICUS CURIAE

# BRIEF

No. 86-728 (3)

Supreme Court, U.S.
FILED
APR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

BILL HONIG,
CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,
*Petitioner,*

vs.

JOHN DOE and JACK SMITH,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit**

## BRIEF OF THE DAVIS JOINT UNIFIED SCHOOL DISTRICT, THE ESPARTO UNIFIED SCHOOL DISTRICT, THE NAPA VALLEY UNIFIED SCHOOL DISTRICT, THE WASHINGTON UNIFIED SCHOOL DISTRICT, THE WINTERS JOINT UNIFIED SCHOOL DISTRICT, THE WOODLAND JOINT UNIFIED SCHOOL DISTRICT, THE SONOMA COUNTY SUPERINTENDENT OF SCHOOLS, THE TULARE COUNTY SUPERINTENDENT OF SCHOOLS, AND THE YOLO COUNTY SUPERINTENDENT OF SCHOOLS AS AMICUS CURIAE

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33 pp

## QUESTION PRESENTED

1. Whether the stay put provision of the Education for All Handicapped Children Act, 20 U.S.C. § 1415(e)(3), precludes a Local Agency from promptly removing pupils from school who present a threat of danger if permitted to remain in the school environment.

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**No. 86-728**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

BILL HONIG,
CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,
*Petitioner,*

vs.

JOHN DOE and JACK SMITH,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit**

## BRIEF OF THE DAVIS JOINT UNIFIED SCHOOL DISTRICT, THE ESPARTO UNIFIED SCHOOL DISTRICT, THE NAPA VALLEY UNIFIED SCHOOL DISTRICT, THE WASHINGTON UNIFIED SCHOOL DISTRICT, THE WINTERS JOINT UNIFIED SCHOOL DISTRICT, THE WOODLAND JOINT UNIFIED SCHOOL DISTRICT, THE SONOMA COUNTY SUPERINTENDENT OF SCHOOLS, THE TULARE COUNTY SUPERINTENDENT OF SCHOOLS, AND THE YOLO COUNTY SUPERINTENDENT OF SCHOOLS AS AMICUS CURIAE

## INTEREST OF AMICUS CURIAE

The above named school districts and county superintendents of schools have joined together as amicus curiae in this action[1]. They herewith file their brief in support of Petitioner Bill Honig,

[1] Both school districts and county superintendents of schools provide programs to handicapped pupils in California. For convenience, they will all be referred to herein as "Local Agencies."

California Superintendent of Public Instruction. Local Agencies have obtained the consent of the parties in accordance with United States Supreme Court Rule 36(2). Said consents have been forwarded to the Court under separate cover.

The Local Agencies have an interest in the issues concerning the "stay put" provision of the Education for All Handicapped Children Act, P.L. 94-142 of 1975, ("EAHCA") inasmuch as the Local Agencies operate the educational programs in which handicapped children are educated pursuant to the EAHCA.

An incident which occurred in Yolo County highlights the interest of Local Agencies. On May 4, 1983, a physical altercation broke out among several male pupils on the Davis High School campus. It lasted three to four minutes. One participant, James, a mainstreamed learning-handicapped pupil under the EAHCA, pulled a knife and stabbed his opponent in the chest. Forty (40) minutes later, the victim was dead. James was first suspended and then expelled, from the schools of the Davis Joint Unified School District (See Appendix A)[2]

Had the decision of the 9th Circuit in *Doe v. Maher* been final in 1983, James probably could not have been promptly expelled. This is because the 9th Circuit's Slip Opinion ("Slip Opinion") requires that:

A. When a handicapped pupil is recommended for expulsion, an individualized education program ("IEP") team must convene to determine whether the misconduct was a manifestation of the handicap and whether the educational placement was appropriate.

B. The pupil must remain in his current placement until all appeals from the IEP team's determination are exhausted. Since such appeals may be taken to a state hearing officer, to state or federal court, and thence to the appropriate appellate courts, the stay put rule can effectively block the recommended expulsion for a very long time, perhaps three to five years.

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[2] Appendix A is a Sacramento *Bee* newspaper article covering this incident.



James was suspended from school and incarcerated on May 4, 1983. His attorney sought his release at a court hearing on May 13, 1983. An IEP team meeting was convened to determine whether his misconduct was related to his handicap. The determination was in the negative. Had his parents appealed that determination, and had his attorney been successful, under the Slip Opinion and § 48911(a)[3], James would have been entitled to return to Davis High School on Monday, May 15, 1983, and to remain there until his parents' appeals were exhausted.[4]

Local Agencies lie within the jurisdiction of the 9th Circuit Court of Appeals.

## STATUTES AND REGULATIONS INVOLVED

The arguments presented by the Local Agencies principally involve the following statutes and regulations:

1. The procedural safeguard provisions of the Education for All Handicapped Children Act, 20 U.S.C. § 1415.

2. Federal Regulations implementing and/or pertinent to the procedural safeguard provisions, 34 C.F.R. §§ 300.513, 300.552, Part 104, Appendix A, Paragraph 24, reproduced at Appendix B.

3. The exclusion and suspension/expulsion provisions of the California Education Code, California Education Code §§ 48212, 48900, 48900.5, 48903, 48910, 48911, 48911.5, 48912, 48912.5, 48913, 48914, 48915, 48915.5, 48916, 48917, 48918, and 48919.

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[3] All Code references are to the California Education Code unless otherwise noted.

[4] At pages 20-21 of the Slip Opinion, the court states that the California Education Code, § 48912, enacted in 1983, authorized suspension of twenty and sometimes thirty days. This is not entirely accurate. Under Education Code §§ 48912 and 48903, school officials may suspend a pupil for a total of twenty to thirty days within one school year, but officials cannot suspend for more than five days for any one incident (§ 48911(a)).

## STATEMENT OF THE CASE

### A. Summary of Pertinent Facts

John Doe, a seriously emotionally disturbed handicapped pupil, was enrolled in the San Francisco Unified School District's program for handicapped students. On November 6, 1980, Doe had a violent outburst at school in the course of which he tried to choke another student and broke a plateglass window. This was the second time since school opened in September that he had attacked another student. Prior to the 1980-81 school year, Doe had been discharged from a California state mental hospital.

Doe was immediately suspended, and was recommended for expulsion by the administrator in charge of his program. His suspension was extended pending a hearing as to whether he should be expelled. California law permits such extended suspensions for up to thirty school days, § 48918(a). His mother was notified of the extended suspension and recommended expulsion. She brought this action on his behalf in federal court arguing that his extended suspension and recommended expulsion violated his rights under the EAHCA. The district court agreed and Doe returned to school in December under court order.

### B. The District Court's Opinion

The District Court issued a wideranging opinion which attempted to formulate procedures to be followed when suspension or expulsion of a handicapped pupil arose.

### C. New Legislation

As a result, §48915.5 was enacted in 1985 which specifically formulated such procedures.

That legislation provided for the suspension and expulsion of handicapped pupils in much the same manner as other pupils. It injected certain safeguards into the process to ensure that suspension and expulsion were not substituted for an appropriate educational placement if a pupil's handicapping condition was the direct cause of his or her misconduct (Stats. 1985, Chapter 907).



In addition, in 1983, a sweeping education reform bill revamped procedures and limitations for the suspension and expulsion of all pupils (Stats. 1983, Ch. 498).

### D. The 9th Circuit Opinion

While the Slip Opinion is in many respects more favorable to Local Agencies than the district court opinion, its rulings pertaining to the stay put issue are incorrect and unworkable.

The 9th Circuit held that handicapped pupils were not subject to the same rules regarding suspension and expulsion as regular education pupils unless an IEP team convened and properly determined that the misconduct was not handicapped related. (Slip Op. p. 19). It further held that determination to be subject to review by a state hearing officer and appealed to the courts. (Slip Op., pp. 22-23.) During the pendency of the review and appeal, the pupil could not be removed from school except for short-term suspensions. Such suspensions would be acceptable to the 9th Circuit if they did not exceed twenty to thirty days. However, state law limits suspensions for a single incident to five days. Thus the pupil must be returned to the classroom on the sixth day after the misconduct occurred if the IEP determination has been appealed. He must be permitted to return regardless of the gravity of the misconduct or the risk of danger and disruption that it represents.

## SUMMARY OF ARGUMENT

Local agencies tender a tripartite argument. First, they argue that the stay put rule cannot be permitted to infringe upon their ability to provide a safe and secure learning environment for all pupils. State law requires that Local Agencies accept and educate pupils residing in their attendance areas unless the pupils have been suspended, expelled or excluded. State law also requires Local Agencies to provide a safe learning environment. Legislative history, implementing regulations, and two federal appeal courts have all clearly stated that the stay put rule was not intended to take away school authorities' ability to suspend or

expel a pupil whose presence endangers himself or others and threatens to disrupt a safe school environment.

Second, Local Agencies argue that the EAHCA was not intended to give greater rights to handicapped pupils than others enjoy. School rules pertaining to suspension/expulsion must be applied evenhandedly to all pupils.

Third, Local Agencies argue that suspension and expulsion do not constitute changes in placement within the meaning of the EAHCA. Suspension/expulsion are disciplinary measures taken within a given placement and subject to their own Due Process procedures. A change in placement under the EAHCA is a change in the educational program of a pupil which is effected through the pupil's IEP team to ensure that the most effective program possible is provided for the child. Parents may appeal change of placement decisions through the EAHCA Due Process procedures. The two Due Process procedures are different and protect different interests. They operate independently of each other.

## ARGUMENT

### I

### CONGRESS DID NOT INTEND THAT THE STAY PUT RULE INFRINGE UPON LOCAL AGENCIES' ABILITY TO PROVIDE A SAFE AND SECURE LEARNING ENVIRONMENT

A recent amendment to the California Constitution includes a provision entitled, "Right to Safe Schools." It provides, "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." (California Constitution, Article 2, § 28, subdivision (c)). Section 32261 echoes this mandate, providing: "The legislature hereby recognizes that all pupils enrolled in the state public schools have the inalienable right to attend classes on campuses which are safe, secure and peaceful . . . the legislature further recognizes that school crime,



vandalism . . . are significant problems on far too many school campuses in the state."

The California Court of Appeal has recently ruled that the above cited provisions, together with compulsory attendance laws, create a duty on the part of local agencies to provide a safe learning environment for pupils (*Rodriguez v. Inglewood Unified School District* (1986) 186 CA3d 707.) Tort liability thus lies against local agencies who fail to meet this obligation.

Where a student such as James creates a danger to himself and others on a school campus, there are only three means at a school's disposal for denying him access to the campus: suspension (§ 48911), expulsion (§ 48915) or exclusion (§ 48212).[5]

The stay put rule is contained in 20 U.S.C. 1415(e)(3). It provides:

> (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, . . .

Under the Slip Opinion, this provision would delay the exclusion or expulsion of special education pupils until the exhaustion of appeals from the IEP determinations.

Congress did not intend the stay put rule to be interpreted in this manner. The legislative history of Public Law 94-142 refutes the 9th Circuit's interpretation. Public Law 94-142 had its genesis in *Mills v. Board of Education of District of Columbia* (1972) 348 F.Supp. 866.[6] In *Mills*, plaintiffs were handicapped pupils living in the District of Columbia. They argued that this District's

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[5] Exclusion is not generally available for misconduct, although it may be used where misconduct is related to a disability.

[6] See Senate Report No. 94-168, *U.S. Code Cong. & Admin. News*, 94th Cong. 1st Sess. (1975), hereinafter "Senate Report," p. 1429; "The Education for All Handicapped Children Act since 1975," *Marquette Law Review* Vol. 69:51, 54, hereinafter "Marquette Law Review."

failure to provide them a free and appropriate public education denied them due process. They prevailed. In the Court's Judgment and Decree, the Court fashioned a detailed plan whereby such services would be provided. The plan provided for a hearing for parents to challenge placement decisions. It stated:

> Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal . . . shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others.
>
> (*Mills, supra,* 883.)

The Court thus preserved the school principal's authority to maintain a safe campus.

Federal regulations implementing P.L. 94-142 recognized this need. 34 C.F.R. § 300.513 restates the stay put rule. The Comment to the regulation then says:

> Comment. Section 300.513 does not permit a child's placement to be chaged [sic] during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

Exclusion, suspension and expulsion are normal procedures for dealing with children who endanger themselves or others.

Courts interpreting P.L. 94-142 have recognized this need. When James Jackson admitted to unbuttoning the blouse of a female special education pupil and touching her breasts, the 5th Circuit upheld the exclusion of the 17 year old learning disabled student. It held:

> Although the statute provides for maintaining a child in his most current educational placement, schools have discretion to alter a handicapped student's placement when he endangers himself or others and threatens to disrupt a safe school environment. This exception to the general rule was recognized in *S-1 v. Turlington*, 635 F.2d 342, 348 n. 9 (5th Cir. 1981): '[T]he local school board retains the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others.' See also *Stacy G.*, 695 F.2d at 955 n. 5 ('automatic preliminary injunction' provided by section 1415(e)(3) does not place a statutory bar to the district court's grant of equitable relief that may result in a modification of the child's placement); 45 C.F.R. § 300.513 (comment) ('While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others').
>
> *Jackson v. Franklin County School Board* (1985) 765 F. 2d 535, 538.



When *Victoria L.* brought a razor blade and martial arts weapons to school and threatened to kill another student, the 11th Circuit upheld the involuntary transfer of this learning disabled high school student to an alternative program. It held:

> Appellant next argues that the record contains uncontested evidence that defendants violated her procedural right to remain in the high school during the pendency of the action, guaranteed by 20 U.S.C. §1415(e)(3). We disagree. Even those cases which interpreted the Rehabilitation Act as expanding handicapped students' rights beyond those specifically afforded by the EHA have held that Congress had no intent to deprive local school boards of their traditional authority and responsibility to insure a safe school environment. See, e.g., *S-1 v. Turlington*, 635 F.2d 342, 348 n. 9 (5th Cir. 1981) cert. denied 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473. . . . The uncontradicted evidence leaves no doubt that Victoria's behavior at the high school posed a threat to both students and school officials. Accordingly, we find that the defendants properly exercised the traditional disciplinary authority that they retained under the EHA.
>
> (*Victoria L. v. District School Bd.* (1984) 741 F.2d 369, 374.)

It is true that some courts have not reached the same conclusion as the 5th and 11th Circuits. For example, *Lamont X v.*

*Quisenberry* (1984) 607 F.Supp. 809, concerned two severely behaviorally handicapped boys. Del, 15, suddenly became angry while playing with other students. He hit another student, kicked him, ripped his collar of his shirt, and then threw books and a ruler around the classroom. Two days later, Lamont, 12, became angry and threatened to beat up his teacher. He threatened the teacher, saying, that if the teacher ever came near his residence hall, the teacher would never come out. He picked up a plastic baseball bat and began striking objects in the classroom. He destroyed furniture, threw objects around the room, and generally destroyed the classroom. He stole property out of the classroom cupboard, (*Id.* 812). School officials removed Del and Lamont from the classroom for extended periods of time. The school officials also referred them to the police due to the criminal nature of their misconduct.

The District Court not only enjoined their removal from school based on the stay put rule; it chided school officials for referring them to the juvenile authorities. Even though the prosecutions were sustained, the Court felt, "criminal prosecution [was] an inappropriate response" to the misconduct. (*Id.*, footnote 2, page 813.)

We submit that court rulings such as *Lamont X* go too far in sheltering handicapped pupils from the normal consequences of their behavior. Even handicapped pupils must learn that conduct which places others in danger or destroys property is unacceptable.[7]

When a pupil presents a clear risk of harm to others, school authorities must act quickly. Often long term removal of the offensive pupil, e.g., exclusion or expulsion, is the only remedy. The EAHCA was not intended to rob school officials of that capability.

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[7] Additional lower court decisions are discussed under Argument III, p. 14.



## II

## CONGRESS DID NOT INTEND THAT THE STAY PUT RULE GIVE GREATER RIGHTS TO HANDICAPPED PUPILS THAN NONHANDICAPPED PUPILS ENJOY

Consider the following hypothetical situation. John and Mary are caught selling illegal drugs on the Midtown Junior High School campus. John is a handicapped pupil; Mary is not. Under State law, the sale of illegal substances on a school campus is an expellable offense; no other findings are required. Assume that John and Mary are initially suspended for five days each. An IEP meeting is convened for John to determine whether the misconduct is related to the handicapping condition. The IEP team also considers whether John's placement was appropriate. The IEP team concludes that the misconduct was not related to the handicapping condition and that the educational placement was appropriate. John is hearing impaired.

Under the Slip Opinion and § 48911(a), Mary can be expelled from school; John can only be suspended for five (5) days which could be extended for a maximum of thirty (30) days, unless his parents elect not to appeal his IEP team determinations.

### A. When the Misconduct Is Not Related to the Handicap, Handicapped Pupils Should Be Subject to Normal Disciplinary Procedures

Under the Slip Opinion, John enjoys greater rights than Mary because he can avoid expulsion. Such was not the intent of Congress. In *Mills v. Board of Education, supra,* the Court ordered the board to provide an *equal* education for handicapped children. The legislative history of the EAHCA (Senate Report, pp. 1429-1433) indicates that it was designed to provide educational opportunities to handicapped children which are equal to those of non-handicapped children, and that the right to a free and appropriate public education must be assured equally to all groups within the nation. "It is the intent of the committee to establish and protect the right to education for all handicapped children and to provide assistance to the states in carrying out their responsibilities under State law and the U.S. Constitution to provide equal protection of the laws." (*Id.*, p. 1437).

In *Doe v. Koger* (1979) 480 F.Supp. 225, plaintiffs complained that handicapped pupils were being subjected to the same disciplinary expulsions as all other pupils. The court responded, "It is not the purposes of the equal protection clause to guarantee that members of a suspect class be given superior rights . . . , rather it is the purpose of the equal protection clause to guarantee that members of a suspect class be given equal rights under a given policy." (p. 230)[8]

**B. When the Misconduct Is Related to the Handicap, It Still May Be Necessary to Remove the Pupil from the School Setting on a Long-Term Basis**

The *Koger* court sustained the superior rights of handicapped pupils not to be expelled from school if the handicap caused the misconduct. The next issue is therefore whether the stay put rule gives superior rights to pupils who are disruptive because of their handicap. *Koger* says it does. But *Koger* follows the fallacious reasoning first relied upon in *Stuart v. Nappi* (1978) 443 F.Supp. 1235. Both courts relied upon a comment in the pertinent federal regulations which HEW took from a comment to Rehabilitation Act regulations. Only a portion of the Rehabilitation Act comment was included in the EAHCA regulations. By taking the Rehabilitation Act comment out of context, its meaning was grossly subverted and distorted.

The regulation is 45 C.F.R. § 121a.552,[9] which quotes 34 C.F.R. Part 104, Appendix, Paragraph 24. The Court interprets this Comment to mean that schools are not to expel students whose handicaps cause them to be disruptive; rather, schools are to appropriately place such students (*Doe v. Koger, supra,* p. 228).

The Comment does not say that. The Rehabilitation Comment deals with "Educational Setting." It states that existing regulations set standards for educating handicapped persons with non-handicapped persons or "mainstreaming" them to the maximum

[8] It should be noted that the handicapped children were not found to be "suspect class." *Doe v. Koger, supra,* p. 230.

[9] 45 C.F.R. § 121a.552 is now 34 C.F.R. § 300.552.



extent possible. It places restrictions on the removal of handicapped persons from the regular educational setting. It then creates an exception to the "mainstreaming" requirement "where the handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired." If this occurs the needs of the handicapped student are deemed not to be met in the regular classroom and mainstreaming is not required. (See Appendix B.) In no way does Paragraph 24 prohibit the expulsion of handicapped pupils.

A close reading of Paragraph 24 manifestly discloses that when read in context, it simply does not say what the Courts indicate it says (*Stuart,* p. 1243; *Koger,* p. 228). Reliance upon this regulation to support a holding that handicapped children whose misconduct is related to their handicap may not be expelled is sadly misplaced.

Obviously, if there is a more appropriate placement for a disruptive handicapped child, that placement should be tried. But it cannot be presumed that such a placement is available. And it cannot be presumed that the parents will agree to the change. If they do not, Local Agencies again are faced with the clash between the stay put rule and the need to maintain a safe learning environment free from disruption.

There is nothing in the EAHCA or its implementing regulations which gives handicapped pupils this superior right. Congress did not so intend.

## III

## SUSPENSION AND EXPULSION DO NOT CONSTITUTE CHANGES IN EDUCATIONAL PLACEMENT WITHIN THE MEANING OF THE EAHCA[10].

### A. The Pupil Discipline Statutes and the Handicapped Pupil Statutes Should Be Construed to Harmonize

It is axiomatic that the courts will interpret statutory provisions so as to harmonize rather than clash where the language of the statutes is reasonably susceptible of such an interpretation. (*People Ex Rel Younger v. Superior Court* (1976) 16 C3d 30, 40; *State Comp. Ins. Fund v. Industrial Acc. Com.* (1961) 56 C2d 681, 686; *Hough v. McCarthy* (1961) 54 C2d 273, 279)[11].

The EAHCA, specifically 20 U.S.C. § 1415, and the California suspension/expulsion statutes, §§ 48900-48919, may easily be harmonized if it is recognized that long term suspension and expulsion are not changes in educational placement under the EAHCA.

It is first necessary to understand how the two procedures operate. Appendix D takes John and Mary through the procedures which would apply to each if the Slip Opinion were final. Day 40 finds John back in school for the duration of his appeals and Mary expelled from school for the remainder of the school year. Appendix C demonstrates that these statutes are totally inconsistent in their application, as interpreted by the 9th Circuit.

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[10] Under § 48918(a), suspensions may be imposed during the expulsion process which may be longer than the thirty (30) days sanctioned by the Slip Opinion. Thus suspension remains at issue.

[11] While it is true that the clash herein is between State and Federal statutory schemes, suspension and expulsion have been the ultimate disciplinary tools used by schools for generations. Congress had to have been aware of these disciplinary tools when it enacted Public Law 94-142.



### B. The Suspension/Expulsion Statutes Do Not Authorize a Change in Educational Placement

To analyze the suspension/expulsion statutes, we must determine the interest protected by the procedure and the risk against which the procedure is designed to protect.

The suspension/expulsion statutes were enacted in response to *Goss v. Lopez* to protect a pupil's property interest in education. As was stated in *Goss*, ". . . the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." (*Goss v. Lopez* (1975) 419 U.S. 565, 574; 42 L.Ed. 2d 725, 734-735; 95 S.Ct. 729.)

Pupils are suspended and expelled from school to protect other pupils and to punish them and not because suspension and expulsion are considered to be an appropriate alternative educational placements. "Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device." (Id., 738.) "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school" (Id., p. 739).[12]

It is precisely because suspension and expulsion constitute a deprivation or withdrawal of educational services that the Due Process right attaches. The *Goss* court said, "Ohio may not *withdraw* the right to an education on the grounds of misconduct absent" Due Process procedures. (Emphasis added). Similarly, the Due Process Clause is applicable when a "tax-supported educational institution [removes] a student long enough for the removal to be classified as an expulsion." (Id. at 736.)

The suspension/expulsion statutes provide Due Process procedures. The interest protected by the suspension/expulsion statutes is the property interest of all California pupils in education. The

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[12] See also *Board of Education of the City of Peoria, School District 150 v. Illinois State Board of Education* (1982) 531 F.Supp. 148.

due process procedures protect against unwarranted withdrawal or deprivation of that interest by school officials. The procedures do not provide for changes in educational placement.

### C. The Handicapped Pupils' Procedural Safeguards Do Not Indicate That Suspension and Expulsion Constitute a Change in Educational Placement

Here, we must again determine the interest protected by the procedural safeguards and the risk against which the safeguards are designed to protect.

The procedural safeguards of 20 U.S.C. § 1415 were enacted as part of Public Law 94-142 of 1975. That law was enacted in response to *Mills, supra,* and the plethora of litigation which followed *Mills* asserting that the public schools' failure to provide handicapped children with a publicly-supported education was unconstitutional. (*Marquette Law Review, supra,* pp. 54-56.)

Under Public Law 94-142, once a child has been determined to have a handicap, his educational placement must be determined through an individualized planning conference. (Senate Report, pages 1434-1435.) The mission of the individualized planning conference is to tailor an individualized educational program to meet the child's needs. (Senate Conference Report No. 94-455, *U.S. Code Cong. and Admin. News,* 94th Cong. 1st Sess. (1975), hereinafter "Senate Conference Report,", p. 1492.) Any revision of the IEP may be done only with the agreement of the parents or guardian to insure that services to the child are not arbitrarily curtailed or modified. (Senate Report, p. 1435.) Procedural safeguards are provided for parents in decisions regarding the *identification, evaluation* and *placement* of the handicapped child. (*Id.*, p. 1453. Emphasis added.) The procedural safeguards are designed to give the parent a means to present a complaint and include an impartial administrative process and court review. (Senate Conference Report, pp. 1502-1503.)

The procedural safeguards of the EAHCA establish a Due Process procedure. The interest protected by the EAHCA is the property interest of handicapped pupils in a free and appropriate public education equivalent to that provided to nonhandicapped pupils. The procedural safeguards protect that interest against



arbitrary curtailment or modification by school officials. The process is designed to insure the best possible educational placement for each handicapped child; it does not apply to disciplinary measures which are taken within that placement.

### D. Lower Court Decisions Which Have Held That Expulsion Constitutes a Change in Placement Are Predicated Upon Faulty Findings

Quite a few lower courts have held that expulsion is a change in educational placement. They have been misled by the seminal case of *Stuart v. Nappi, supra,* which was the first to consider the issue. Kathy Stuart was expelled in her third year of high school because she was involved in school-wide disturbances. These disturbances were preceded by a long history in which the school district did not timely or regularly convene her IEP team and did not comply with the plans that were formulated when the team met (pp. 1238-39). She sought to enjoin her expulsion.

The Court granted the preliminary injunction. The Court predicated its ruling upon two federal regulations, neither of which supports the findings derived from them. The Court first looked at the comment to 42 C.F.R. § 121a513[13] which states:

> While the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves and others

and contains a Comment-to-the-Comment which states:

> A Comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

The Court interpreted these Comments to mean that the stay put rule "prohibits disciplinary measures which have the effect of changing a child's placement while permitting the type of procedures necessary for dealing with a student who appears to be

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[13] 42 C.F.R. §121a.513 is now 34 C.F.R. § 300.513. Appendix B.

dangerous." (p. 1242.) The Court admits that the language is "somewhat cryptic."

The Court's reasoning is circuitous. In the above finding, it hypothesizes at the outset its conclusion that expulsion constitutes a change in placement under the EAHCA. By contrast the *Jackson* court cited the same Comment in support of its holding that schools *may* change a child's placement for disciplinary reasons if needed to maintain a safe school environment regardless of the EAHCA, and did not find the Comment "cryptic" at all (p. 12, *supra*).

The Court also fails to give any indication as to the "type of procedures" schools are to use to deal with dangerous students if they can't use expulsion. Should James be permitted to return to the Davis School District within a month of the stabbing if he serves one hour of detention each day? Or writes on the blackboard 100 times, "I will not stab my fellow students?" Sometimes long term removal, e.g., expulsion, is the *only* way for schools to deal with a student who is dangerous.

The Court found that the Comment to the Rehabilitation Act regulations, quoted in the Comment to the HEW regulation, 45 C.F.R. § 121a.552, discussed supra, means that handicapped children cannot be expelled because the EAHCA provides a procedure whereby disruptive children are transferred to more restrictive placements (p. 1242). As was pointed out previously, the Rehabilitation Comment doesn't say that at all (p. 13). The *Stuart* analysis thus proceeds on the basis of two incorrect findings which have no legal basis.

*Stuart v. Nappi* should not be followed. Nor should its progeny.[14]

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[14] The following cases cite *Stuart* and follow its rubric to a greater or lesser degree. *Doe v. Koger, supra*; *Sherry v. New York State Ed. Dept.* (1979) 479 F.Supp. 1328; *S-1 v. Turlington* (1981) 635 F.2d 342; *Kaelin v. Grubbs* (1982) 682 F.2d 585; *Lamont X v. Quisenberry* (1984) 607 F.Supp. 809; *School Board of the County of Prince William, Virginia v. Malone* (1985) 762 F.2d 1210.



California law requires that when a handicapped pupil's misconduct is so serious as to warrant a principal's recommendation for expulsion, the body charged with overseeing his educational program the IEP team, should be consulted (§ 48915.5). Under federal law, a parent may initiate such a consultation by presenting a complaint to the Local Agency (20 U.S.C. § 1415(b)(2)). But to hold that the consultation arises from a change in educational placement which triggers a panoply of Due Process procedures together with the stay put requirement is to intolerably hamstring school officials in their never-easy job of maintaining student discipline.

## IV

## RELYING UPON INJUNCTIVE RELIEF FROM THE STAY PUT RULE IS UNWORKABLE

The Slip Opinion indicates that "educational agencies in extraordinary circumstances may seek judicial relief should existing procedures prove inadequate to cope with truly exigent circumstances" (Slip Op. pp. 25-26). But it also says, "... section 1415(e)(3) does not list any exceptions to its automatic injunction."

If the 9th Circuit's ruling that there are no exceptions to the stay put rule were allowed to stand, there would be no authority for a local superior court judge or federal district court judge to enjoin its operation. Moreover, disciplinary expulsions and suspensions must be swift. Trial court calendars are clogged and generally cannot accommodate civil litigants immediately. In addition, it is impracticable and unnecessary to burden local trial courts with such complaints for injunctive relief when the rights of the pupil are already adequately protected by suspension/expulsion due process statutes.

## CONCLUSION

For the reasons stated above, the District Court erred in ordering John Doe to return to school when expulsion proceedings were pending against him. John Doe's conduct posed a threat to both students and school officials. The school district's use of suspension and expulsion procedures to remove him from school must be sustained, and the District Court's order to the contrary must be reversed.

Respectfully Submitted,

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By JAN K. DAMESYN
Senior Deputy
*Attorneys for Amicus Curiae*

Dated: March 20, 1987.

**Appendix A**

THE SACRAMENTO BEE
Saturday, May 14, 1983
SUSPECT IN VEITNAMESE YOUTH'S
SLAYING KEPT CONFINED
By Mario Dianda
Bee Correspondent

After claiming that James "Jay" Pierman accidentally stabbed a Vietnamese classmate to death May 4 while trying to defend himself in a brawl at Davis High School, Pierman's attorney Friday argued unsuccessfully that the boy should be released to his parents' custody.

"If released, I feel he'd flee," said Yolo County Juvenile Court Judge Lewis Shearer.

Because Pierman was placed on probation last month following a February knife brandishing incident, he "should have backed off" from the brawl, Shearer said.

Shearer ordered Pierman to remain at Yolo County Juvenile Hall in Woodland pending a June 14-15 hearing to determine whether the 17-year-old suspect should be tried as a juvenile or adult.

The Yolo district attorney's office has charged Pierman with the murder of Thong Hy Huynh, 17, Huynh, native of Vietnam, moved to Davis with his family three years ago from Taiwan.

Bon Chau, one of four Vietnamese students involved in the fight against Pierman and another white student, Russell "Rusty" Clark, said previously that the confrontation followed weeks of racist taunting by Pierman and a handful of white students.

Deborah Fingh, a senior probation officer for Yolo County, testified at Friday's hearing in Woodland Juvenile Court. She said witnesses and the Vietnamese students told Davis police that as Clark passed the Vietnamese boys on his way to Pierman's car on the morning of the fight he made derogatory remarks.

## Appendix B

34 CFR § 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

*Comment.* Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does nor preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

34 CFR § 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually.

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home:

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.



*Comment.* Section 300.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

34 CFR Part 104, App. A, ¶ 24. Educational setting. Section 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that

the needs of the student would, on balance, be served by placement in another setting.

Although under § 104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 104.34



## Appendix C

| School Days | Mary<br>Pupil Discipline Statutes<br>(§§ 48900 et seq.) | John<br>Handicapped Pupil Statutes<br>(20 U.S.C. § 1415) |
|---|---|---|
| Day 1 | Drug sale and suspension | Drug sale and suspension |
| Day 5 | Initial suspension period ends. The principal recommends expulsion. Mary and her parents are sent notice that the suspension is being extended pending expulsion proceedings. Mary remains out of school. | Initial suspension period ends. The principal recommends expulsion. John and his parents are sent notice that suspension is being extended pending expulsion proceedings. John remains out of school. |
| Days 5-20 | | John's IEP team convenes and makes its determinations. If it determines John's misconduct was caused by his handicap, an alternative placement is proposed. John's parents request an EAHCA hearing regarding the IEP determinations. |
| Day 20 | Mary and her parents are sent notice of the expulsion hearing, which must be scheduled to begin within 30 school days after the drug sale § 48918(a). | John returns to school pending resolution of his appeals. |
| Day 30 | Expulsion hearing is held. Mary remains out of school pending decision. | John is attending school. |
| Day 40 | School Board orders Mary expelled for remainder of school year. | John is attending school. |

# AMICUS CURIAE

# BRIEF

No. 86-728

Supreme Court, U.S.
FILED
APR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

October Term, 1986

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Bill Honig, California Superintendent of Public Instruction,
Petitioner,

v.

John Doe and Jack Smith,
Respondents.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

---

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OCTOBER TERM, 1986

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v.

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---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

---

This brief amicus curiae in support of Petitioner is submitted with written consents of counsel to all parties.

Letters of consent have been filed with the Clerk of the Court.

## INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for



the fiscal management, staffing, continuity, educational standards and for the adoption and enforcement of standards of student conduct.

Every school district in the country is eligible for funding under the Education for All Handicapped Children Act (EAHCA) which would bring them under the rulings of this Court interpreting the Act.

## ISSUE PRESENTED FOR REVIEW

1. Whether the "stay put" provision of the Education for All Handicapped Children Act, Pub. L. 94-142, precludes a local school district from immediately changing the placement of a child whose handicap-related behavior endangers himself or others.

## STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case in the

brief of Petitioner.

## ARGUMENT

### I. INTRODUCTION

The instant case poses very difficult educational and legal questions with which school districts must contend on a daily basis. The facts presented in this case are not unusual; similar situations arise every day in school districts across the country.

The U.S. Department of Education reports that during school year 1984-1985 4,363,031 handicapped children were counted as receiving special education and related services under the EAHCA and Chapter I of the Education Consolidation and Improvement Act of 1981 (providing federal funds for educationally disadvantaged children). U.S. Department of Education, To Assure the Free Appropriate Public Education of All



Handicapped Children, Eighth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act, Volume I, p. xiv (cited hereafter as "ED Report").

For the last nine years the number of seriously emotionally disturbed students receiving services has increased by 32%, in spite of the overall decline in public school enrollments. Id. at 5. The reasons for this growth are several, including the increased capability of the schools to serve such children and an increase in "negative environmental conditions," such as child abuse, changes in the family structure and in societal standards and values. Id. at 5, 7. The Department of Education reports that 373,207 "emotionally disturbed" children were served in 1984-85. Id. at G-3. By definition, any of these children pose a

potential danger to themselves or others. During that same year 717,785 mentally retarded children were served. Id. Because of their diminished ability to understand rules, these children, too, may be disruptive.

Depending on their needs, some of these emotionally disturbed and mentally retarded children are placed in public or private residential settings. Others are educated in the public schools in special education classes with other handicapped children. Still others are placed in a completely "mainstreamed" situation in classes with non-handicapped children. During the 1983-84 school year, approximately 42% of emotionally disturbed children and 35% of mentally retarded children were served in regular classes; 33% of emotionally disturbed and 52% of mentally retarded children were served in



separate classes; and 10% of the emotionally disturbed and 12% of the mentally retarded were served in separate schools. ED Report at 60.

The range of situations where such children could pose a hazard to themselves or others includes students with problems of hypersexuality who are unable to control their drives and verbally or physically abuse other children or school teachers. Others pose a danger because of their difficulty in controlling emotional outbursts. Still others may be so disruptive, although perhaps not physically dangerous, as to preclude either themselves or others from receiving an education.

The EAHCA requires school districts to develop an Individualized Education Program (IEP) for each handicapped child in the district, and to monitor the

progress of each child so as to make whatever changes are deemed necessary to assure that each child receives a "free appropriate public education." The IEP provides for all the education and related services necessary to meet the unique educational needs of each child. In the case of an emotionally disturbed child, the IEP often will include provisions for removal from the assigned placement when the child becomes disruptive. That type of provision is included both as an instructional tool and as an assurance that the child will not pose a danger to himself or others.

In other cases the IEP may be provisional or temporary. That might occur where, for example, a child has been in a restrictive setting in order better to receive academic instruction, and the school district wants to place the child



with non-handicapped children to allow the child to receive beneficial social exposure. If the less restrictive setting does not prove beneficial or creates serious disruptions, the IEP would provide that the child could be returned to the more restrictive setting.

As noted by the Ninth Circuit in this case, "education is an art in which all who participate must be accorded some flexibility in their practices and relationships." Doe v. Maher, 793 F.2d 1470, 1487 (1986). Educational experts cannot predict with absolute accuracy how a child will progress in a particular setting. That is why the IEP includes educational goals, so that progress can be measured. Thus, at the time of the development of the IEP for an emotionally disturbed child and the determination as to the child's educational placement, it

cannot be guaranteed that the child will not pose a danger to others or to himself.

## II. CONGRESS DID NOT INTEND TO PROHIBIT IMMEDIATE REMOVAL OF A HANDICAPPED CHILD WHO POSES A HAZARD.

### A. Neither the statute nor the legislative history of EAHCA supports a conclusion that Congress intended to prohibit removing dangerous handicapped students from the classroom.

Although the EAHCA and regulations heavily detail the requirements of a "free appropriate public education" to handicapped students, nowhere does Congress indicate an intention to exempt handicapped students from school disciplinary measures where the student poses a hazard to himself or others.

To the contrary, given the premium that Congress placed on the concept of "mainstreaming" (placing the handicapped child in the "least restrictive environment"), 34 CFR § 104.34, 34 CFR § 300.550, it would seem that Congress must



have taken into account that the child would be placed with other children and that the school district would take whatever action necessary to assure the safety of both the handicapped child and the other children in the class with him.

The concept of "mainstreaming" attempts to avoid imposing further disadvantage on handicapped children that may occur when they are unnecessarily separated from their peers and placed in abnormal environments. Greater educational benefits may be achieved by placing the handicapped child in the regular school, either in a special education setting or with non-handicapped children, in the "least restrictive environment" appropriate to the child's needs. In this way, the handicapped child can learn social interaction skills so as not to be disadvantaged later in life

after leaving the educational setting. Hairston v. Drosick, 423 F. Supp. 180, 183 (S.D. W. Va. 1976).

Language in the legislative history of the EAHCA strongly supports "mainstreaming." For example, during the congressional debate on the EAHCA, then Secretary of H.E.W. Weinberger sent to House Minority Leader Rhodes a letter pointing out that mainstreaming has not been shown to be the most effective means of educating handicapped children. During debate in both the House and Senate, the Congress made it absolutely clear that it disagreed. In fact, statements such as that made by Congressman Miller in response to Secretary Weinberger's letter appear throughout the legislative history of the bill:

> I do not believe that the burden of proof should be upon that administrator or teacher who seeks to permit the handicapped child to remain in a normal classroom with his peers. Rather, I believe the burden of proof in terms of the effectiveness of a program ought to rest with that administrator or teacher who seeks for one reason or another to remove a child from a normal classroom, to segregate him or her from nonhandicapped children, to place him in a program of special education.



121 Cong. Rec. H7764 (July 29, 1975).

Congress likely included the "free appropriate public education" requirement because of bias toward "mainstreaming." The use of "appropriate" "suggests that Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education." Board of Education v. Rowley, 458 U.S. 176, 197 n. 21 (1982).

At the same time that the Congress was considering the EAHCA, it was also well aware that crime and violence were on

the rise in the schools and that the problem had aroused much concern.

For example, during that period of time, Senator Birch Bayh chaired a Senate Subcommittee to Investigate Juvenile Delinquency. After interviewing over 500 witnesses across the country and conducting a survey of 757 school system covering almost half of the public elementary and secondary students in the country, the Subcommittee issued a preliminary report entitled "Our Nation's Schools--A Report Card: 'A' In School Violence and Vandalism." After his investigation, Senator Bayh stated that exclusion from school was a valuable disciplinary tool, particularly when reserved for more serious infractions. Bayh, "Seeking Solutions to School Violence and Vandalism," Phi Delta Kappan, January 1978, at 301.



At about the same time Senator Bayh prepared to release his preliminary report, Congress mandated two other studies under the Safe Schools Act. The results of those studies during 1974 and 1975 confirmed the conclusions in the Bayh Subcommittee report. "Violence and Vandalism: Dimensions and Correctives," Phi Delta Kappan, January 1978, at 305.

Starting in 1968, Gallup has conducted an annual national poll surveying the public's attitudes and concerns about public education. The results of the 1978 poll reflected the national concerns that endured throughout the 1970's. Reporting on the results of the 1978 survey, George H. Gallop stated:

> It will come as no surprise that discipline again tops the list of major problems facing the local public schools of the nation. Only once in the ten years since these surveys were initiated has discipline failed to receive more mention than any

other problem.

Gallop, "Tenth Annual Gallop Poll of the Public Attitude Toward the Public Schools," Phi Delta Kappan, September 1978, at 34.

During the same period, one doctor reported treating some 250 teachers for various psychological problems that he described as similar to the problems of people who suffer from combat neurosis or of survivors of war disasters. He indicated that during the interviews with the teachers, many of them referred to their schools as "battle zones." Bloch, "The Battered Teacher," Today's Education, March-April 1977, at 58.

The need for flexibility in imposing discipline is even more crucial now than at the time of the passage of the EAHCA. As this Court recently noted in the case of New Jersey v. T.L.O., 105 S.Ct. 733,



742 (1985):

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. [Citations omitted.] Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Goss v. Lopez, 419 U.S. at 580.

The philosophy in T.L.O. giving local school districts substantial discretion in setting and enforcing educational policy appears in a number of this Court's decisions. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968); Wood v. Strickland, 402 U.S. 308 (1975); Board of Education of Rogers, Arkansas v.

McCluskey, 458 U.S. 966 (1982); Bethel v. Fraser, 106 S.Ct. 3159 (1986).

In the face of such a longstanding and serious national concern, and in absence of explicit language in the statute itself, courts should not ascribe to Congress an intent to preclude school districts from taking action to remove a dangerous handicapped child from the classroom until such time as a safe setting can be found. Although, in passing the EAHCA, Congress intended to discourage the practice of isolating handicapped children from the environment of their peers, it certainly did not intend that this goal override all considerations of safety.

**B. The Congress did not intend implicitly to repeal state statutes authorizing expulsion of students.**

Every state in the country has a



statute relating to the suspension and expulsion of students. Many statutes limit suspensions to 10 days or less. E.g., Colo. Rev. Stat. § 22-33-105(b) (10 days but can be extended for additional 10 days); Conn. Gen. Stat. § 10-233(a) (10 days); Ga. Code Ann. § 20-2-751 (short term suspension is 10 days or less; long term suspension is more than 10 days); Ind. Code Ann. § 20-8.1-1-10 (5 days); Neb. Stat. Ann. § 79-4,179(1) (short term suspension is 5 days; long term suspension is 6-20 days); Tex. Code Ann. § 21.301(a) (6 days); Wis. Stat. § 120.13 (7 days). The states probably selected these time limits in light of this Court's decision in Goss v. Lopez, 419 U.S. 565 (1975), that provided that a 10 day suspension would entail only minimal due process protections. An expulsion, under these statutes, would be any period

greater than 10 days.

Some states, such as Connecticut and Tennessee, require the child to be provided an alternative placement during the period of expulsion. Conn. Gen. Stat. §10-233(c); Tenn. Code Annot. § 49-6-3402. In other states, such as Arizona, Florida and Georgia, an expelled child loses the right and obligation to attend a public school for a period that could extend to the end of a school term or school year and one additional year of attendance. Ariz. Rev. Stat. Ann. § 15-840; Fla Stat. Ann. § 228.041(28); Ga. Code § 20-2-751.

Interestingly, the first court decision to equate expulsion with change in placement was Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978). Connecticut's definition of expulsion is unusual in that it does not entail the total loss of the right to educational services. Expulsion



in Connecticut is the removal of the student from the educational setting in which the misconduct occurred and placement in some other educational setting. A school district in Connecticut must provide educational services for the individual student during any expulsion. Under such circumstances, it is at least arguable that such an "expulsion" is a "change in educational placement."

Under most state student discipline codes, however, there is no basis for a determination that an expulsion is a "change in educational placement." In absence of a provision in state law or local policy that treats expulsion as a change in educational placement, a federal court has no authority to make that determination.

It flies in the face of logic to say that Congress, without explicit language

to that effect, intended to eliminate, for a portion of the student population, this traditional disciplinary measure. Whether one agrees or disagrees that expulsion is a beneficial educational tool, the determination to eliminate expulsion as a disciplinary alternative for handicapped students must be made by express language in the statute itself, not by judicial inference of an unexpressed intent to eliminate it.

The Supreme Court when presented with such an attack on another traditional disciplinary tool responded that although some might wish to eliminate corporal punishment, nevertheless the policy decision to abolish that disciplinary practice should not be made by the Court. Ingraham v. Wright, 430 U.S. 651 (1977). The proper way to make such a choice would be through the processes of community



debate and legislative action. The Court stated:

> We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many states, that corporal punishment serves important educational interest.

Id. at 681.

Legislative debate to repeal state student discipline laws in order to eliminate expulsion as a disciplinary tool for a portion of the student population did not occur during the enactment of the EAHCA. Congress did not expressly mention that it intended to prohibit the removal of handicapped children from the class or school where their conduct is disruptive or dangerous.

It is inappropriate for the courts to impose such a condition on the receipt of EAHCA funding without clear and unambiguous language in the statute

itself.

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract"...Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Pennhurst State School v. Halderman, 451 U.S. 1, 17. (1981).

Board of Education v. Rowley, 458 U.S. 176, 204 n. 26 (1982).

## III. SECTION 1415(e)(3) OF THE EAHCA DOES NOT PRECLUDE SCHOOLS FROM REMOVING A DANGEROUS CHILD FROM THE CLASSROOM.

The so-called "stay put" provision in the EAHCA, 20 U.S.C. § 1415(e)(3), states as follows:

> During the pendency of any [review proceedings under the EAHCA], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement



> of such child.

The Ninth Circuit views this provision as an absolute bar to a district removing a child from the school or class for longer than the statutory limits on suspension periods. The court holds that a fixed term suspension is permissible because it does not constitute a "change in educational placement" under the Act. However, a removal for longer than 30 days (the Califonia limit on suspensions) is permanent and becomes a "change in placement."

The "stay put" provision is only one of a continuum of procedural provisions in the EAHCA, most of which appeared in the district court's order in the landmark case, Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972). As noted

by this Court on several ocassions, the Congress patterned the EAHCA after the order in Mills. See, e.g., Board of Education v. Rowley, 458 U.S. 176 (1985). The order prohibited change in educational placement pending completion of the due process proceedings. However, the order also included an express exception to that prohibition:

> (14) Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal (responsible to the superintendent) shall warrant that the continued presence of the child in his current program would endanger the physical wellbeing of himself or others.

348 F.Supp. at 883. The Mills court recognized that there may be instances where an absolute bar to change in placement is simply not appropriate.

Likewise, Congress evidenced no



intent to make the stay-put provision mandatory without regard to circumstances of individual cases, but rather included it as a directive. The only floor discussion pertinent to § 1415(e)(3) stresses the flexible nature of the provision as a means of avoiding unnecessary delays in placement:

> The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child are completely protected. We did feel, however, that the placement, or change in placement, should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the Conference adopted a flexible approach to try to meet the needs of both the child and the state.

121 Cong. Rec. 37,412 (remarks of Sen. Stafford) (1975).

Furthermore, the courts have recognized that § 1415(e)(3) establishes a strong preference, but not a statutory

duty, for maintenance of the status quo. See Doe v. Brookline School Comm., 722 F.2d 910 (1st Cir. 1983); Alexander v. Thompson, 658 F.2d 1205 (7th Cir. 1981). The court in Brookline stated:

> We do not believe Congress intended to freeze an arguably inappropriate placement and programs for the 3 to 5 years of review procedings. To construe (e)(3) in this manner would thwart the express central goal of the Act: provision of a "free appropriate public education."

722 F.2d at 918 (original emphasis).

Furthermore, in drafting the regulations implementing the EAHCA, the agency noted that:

> with respect to determining proper placements, . . . it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs.



34 CFR § 300.552--Comment (quoting 34 CFR § 104--Appendix A, Para, 24).

In another comment to the regulations, the agency notes that this section does not preclude removal in emergency situations.

> While the placement may not be changed [under this section], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

34 CFR § 300.513--Comment (emphasis added).

The Fifth Circuit in its first decision in Jackson v. Franklin County School Board, 765 F.2d 535 (5th Cir. 1985), also recognized the necessity for providing an exception. The court opined that "schools have discretion to alter a handicapped student's placement when he endangers himself or others and threatens to disrupt a safe school environment."

Id. at 538. Of course, if the student's IEP does not provide for removal, the EAHCA procedural requirements would attach where the school contemplates a permanent change in placement. Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986). But that does not affect the right of the school district to remove dangerous children from the classroom during the pendency of the proceedings.

The Ninth Circuit disagreed with the Fifth Circuit; the Ninth Circuit ruled that no exception exists unless specifically written into the statute. Such an interpretation ignores the intent of the procedural requirements to provide flexibility to both the school district and the parents in developing an appropriate educational program for the child.

The task of developing an educational



plan for a handicapped student is not an easy one. Under the ruling below, this task becomes even more difficult. Individuals involved in making placement decisions for these students may well avoid recommending "mainstreaming" where they run the risk of being unable to remove a child who proves to be a danger to others. The alternative of placing the child in a more restricted setting has become, under the Ninth Circuit holding, the more expedient choice to assure that a handicapped child will receive education benefits, but it may clearly deny the student the benefits of interaction with his non-handicapped peers. Additionally, it thwarts the initiative of the placement committee (which includes the child's parents) to test the appropriateness of a less restrictive placement.

Among special education stu-
dents, SED(severely emotionally

> disturbed) adolescents in a secondary school setting are one of the least likely groups to be effectively served. [Citations omitted.] Delivering effective instruction and providing appropriate behavioral management for SED secondary school students placed in regular education classes is particularly difficult because of the departmentalized structure used to deliver the secondary curricula. As a result, self-contained special education class placements often result. Further, when a student is classified as SED, suspension and expulsion are no longer available as disciplinary options; thus, some school administrators are reluctant to classify students with emotional disturbances who are disruptive as SED.

ED Report at 39.

The Ninth Circuit's opinion noted that the EAHCA provides no "bright line criteria for determining when a disciplinary measure becomes a change in placement." 793 F.2d at 1484. The court holds that handicapped students may be subjected to the district's "normal"



disciplinary procedures. However, in enforcing such disciplinary measures against handicapped students, school districts are limited to only a "temporary" removal of children who endanger themselves or others. The court defined "temporary" as 30 days, because California law authorizes school districts to suspend students for a period of up to 30 days. Cal. Educ. Code § 48912. Presumably, an "indefinite" removal, lasting the duration of the EAHCA administrative proceedings, is considered by the court to be more than a "temporary" removal and, therefore, constitutes a "change in placement."

But if the student indeed poses a danger to himself or others, which the court agrees authorizes the district to remove the child temporarily, that danger may continue beyond the magic number of 30

days. The danger may continue indefinitely. The court's concern is well placed, that school districts not use disciplinary measures as an excuse to deprive handicapped students of an education. But the court fails to take into account that the administrative procedures of the EAHCA cannot be completed within 30 days. Since the Ninth Circuit's 30 day period for completion of the administrative proceedings is apparently based on California's student suspension statute, in states with shorter suspension periods, the time for administrative hearings would also be reduced accordingly. In those states, compliance would be even more difficult.

This Court has noted the fact that EAHCA administrative proceedings cannot be completed in 30 days, much less 10 days. In Board of Education v. Rowley the Court



stated that:

> [j]udicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings.

458 U.S. at 186-87, n. 9. In Burlington School Committee v. Dept. of Educ., 105 S.Ct. 1996 (1985), the Court noted that the EAHCA administrative and judicial review process takes years to complete, rather than a matter of weeks.

> As this case so vividly demonstrates, however, the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed.

Id. at 2003.

There being no time certain to the IEP process, setting arbitrary limits to the length of time a school can remove a dangerous child from his current placement makes little sense. Instead, individual

circumstances, as well as the good faith conduct of the school system throughout the proceedings, should determine the appropriateness of the school district's decision to keep the child out of the current educational placement.

The Ninth Circuit decision also evidences a degree of naivete regarding the ease with which the district will be able to locate a place for the child where he will no longer pose a danger to himself or others. If, indeed, the district determines that a permanent change in placement is necessary to assure safety, the proper placement may not be easy to find. Some states and localities do not have secure settings for handicapped children who pose a hazard to others. Thus, an out-of-district or out-of-state placement may have to be secured. And, if there is no appropriate public placement



available, a private setting must be located. Often, private institutions are reluctant to accept children who are dangerous or highly disruptive.

Although the district will always have the burden of showing that reasonable, good faith efforts are being made to find a new placement, the district should not have to endanger others during the time of the search by having to keep the child in his former location. Just as ample procedural safeguards assure that the the child receives a "free appropriate public education," so the same safeguards will also assure that the decision to remove the child from school or class was warranted for the protection of the child or his classmates.

School districts have a duty to protect <u>all</u> the students within their jurisdiction. Parents required by the

state to send their children to school have a right to assume that they will be safe.

If the EAHCA is held to be so inflexible as to prohibit a school district from removing a handicapped child from the school or class until such time as appropriate remedial measures can be taken to assure that the child will no longer pose a threat to others, school officials have only one recourse; they will be forced to violate the provisions of the EAHCA as interpreted by the Ninth Circuit. School systems cannot comply with both the Ninth Circuit standard and the duty to protect the health and safety of other students.

## IV. THE EAHCA DOES NOT PRECLUDE SCHOOL DISTRICTS FROM INCLUDING PROVISIONS AUTHORIZING CHANGE IN PLACEMENT AND DISCIPLINE IN THE IEP OF A HANDICAPPED CHILD.

Because of the bias in the EAHCA in



favor of "mainstreaming," school districts will attempt to place the child in the regular class. Even though the child has an emotional handicap "with aggressive tendencies" or a "propensity for aggressive behavior," such as the children in this case, the school district is required by the EAHCA to place the child in the regular classroom with special services where such a placement would be appropriate. The EAHCA emphasizes the need for flexibility and allows school districts to take account of the child's individual educational needs. Section 1412(5)(B) requires states receiving EAHCA funds to establish

> procedures to assure that, to the maximum extent appropriate, handicapped children. . .are educated with children who are not handicapped, and special classes, separate schooling, or the removal of handicapped children from the regular environment occurs only when the nature or severity of the

> handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . .

The school district may decide, for example, to transfer a child from a program for trainable educationally retarded children to a less restrictive program for educable mentally retarded children in order to attempt to serve the child in a more "mainstreamed" setting. If the child becomes disruptive in the new setting, it may become necessary to move the child back to the former setting. If the IEP anticipates the possibility of this behavior, then the IEP would provide that in such an event the student would be returned to the trainable educationally retarded classroom. A handicap committee meeting would not be necessary, since the removal would be part of the student's education plan set forth in the IEP.



Furthermore, when any handicapped child becomes highly agitated or so disruptive that the education of other students is significantly impaired or he endangers himself or those around him, then the child's current placement does not meet his needs and is no longer "appropriate." At these times, schools should be able to use established procedures to remove the child from the classroom. By disallowing the removal of the handicapped child from his current placement under these exceptional circumstances, the Ninth Circuit in effect denies the handicapped child the opportunity to receive a "free appropriate public education" as required by the EAHCA.

Many school districts make it a practice to include disciplinary measures in the child's IEP, which of course is

subject to parental approval or full due process procedures if the parent does not approve. Nevertheless, under the Ninth Circuit's ruling, such provisions would have no effect if they result in the removal of the child from his current placement for a period longer than 30 days.

In the instant case, for example, Respondent Jack Smith's IEP provided for placement in the regular school "on a trial basis dependent upon [Smith's] ability to adapt to a regular school." 793 F.2d at 1477. Although agreeing that there is a need for flexibility in the IEP, the court declared that:

> legitimate flexibility cannot be a tool for circumventing the EAHCA's protections. Before the school may effect a reduction in schedule or any other change in placement contemplated by the IEP, it must notify the child's parents of their right to review and otherwise afford them the safeguards to which they are



entitled.

Id. at 1491.

By so ruling, the court failed to recognize that action taken in implementing an IEP is not punishment, but education. By definition, the IEP is an educational not a disciplinary tool. The implementation of such a provision in an IEP is meant to further a handicapped student's education.

The lower court's position contravenes the congressional intent to provide flexibility in designing an ongoing education plan for each handicapped child. In net effect, this proscription denies school officials the right to include any provision in the IEP which results in removal of the child from his or her educational setting. Congress never intended a result that does such a disservice to the handicapped child by

precluding the school district from making for the child alternative educational provisions that best suit his needs.

Provisions on discipline may be included in the IEP for educational reasons, as well as for reasons of health and safety. As the court pointed out in Hairston v. Drosick, supra:

> ...a child has to learn to interact in a social way with its peers and a denial of this opportunity during his minor years imposes added lifetime burdens upon a handicapped individual.

423 F.Supp. at 183.

This Court, in Goss v. Lopez, supra, recognized that the exclusion from school as a disciplinary tool is a part of the teaching process. Following up on that statement in the majority opinion, the separate dissenting opinion clearly expressed the importance of discipline as part of the educational process:



> Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education, but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied....

419 U.S. at 593.

Just last term, in the case of Bethel School Dist. No. 403 v. Fraser, supra, Chief Justice Burger noted for the majority:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.

106 S.Ct. at 3165.

The fact that the conduct which results in danger or disruption is a "manifestation" of the handicap does not necessarily mean that the child cannot be taught the difference between right and wrong and learn how to conform his conduct to society's norms. Therefore, an appropriate IEP should include a well defined behavior management plan, including anticipated misbehavior and a specific consequence accompanying each specific type of misbehavior. The standards of behavior may be different for children who suffer a handicap that affects their behavior from those imposed on non-handicapped students. Nevertheless, a handicapped child may appropriately be expected to meet the standards established by his IEP. Moreover, by utilizing the IEP process to



set forth the procedures to be followed when misbehavior occurs, the parents are assured of the procedural protections afforded under the EAHCA .

Many children who suffer behavioral problems may ultimately be able to go out into society. When they leave the school setting and attempt to live in society, they will be expected to conform to the same rules and laws as non-handicapped people. The schools must be allowed to teach them those rules.

## V. CONCLUSION

Even where the behavior is held to be a "manifestation of the handicap," amicus submits that the EAHCA does not preclude a school district from removing the child from his current placement if he poses a danger to himself or others or is so disruptive as to preclude either him or others from receiving an education.

Given the fact that the Congress based the entire EAHCA procedural scheme on the Mills decision (which specifically provided an exception to the change in placement rule when the child poses a danger), and given the mood of the country at the time the EAHCA was passed and the longstanding concern by parents and non-parents alike about discipline in the schools, it is inconceivable that Congress intended to tie the hands of school officials in their attempt to protect the children under their care. The EAHCA contains no express prohibition against removal under those circumstances, and the legislative history indicates that was not Congress' intent.

The Ninth Circuit's decision erred in two respects: first, in its absolute prohibition against any "change in placement" during review proceedings; and



second, in its refusal to allow the school district to provide for a change in placement in the IEP itself. For the reasons set forth above and because the Ninth Circuit ruling does a disservice to all public school children, amicus urges the Court to reverse.

Respectfully submitted,

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# BRIEF

Supreme Court, U.S.
FILED
APR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728

In The
# Supreme Court of the United States
October Term, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,
*Petitioner,*

v.

JOHN DOE AND JACK SMITH,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICI CURIAE OF NATIONAL SCHOOL SAFETY CENTER; AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS; NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS; NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS; NATIONAL ALLIANCE FOR SAFE SCHOOLS; INTERNATIONAL ASSOCIATION OF EDUCATIONAL PEACE OFFICERS; NATIONAL ASSOCIATION OF SCHOOL SECURITY DIRECTORS; CALIFORNIA STATE BOARD OF EDUCATION; CALIFORNIA SCHOOL PEACE OFFICERS ASSOCIATION; CALIFORNIA JUVENILE OFFICERS ASSOCIATION; SUNNY VON BULOW NATIONAL VICTIMS ADVOCACY CENTER; VICTIMS ASSISTANCE LEGAL ORGANIZATION; CENTER FOR EDUCATIONAL LEADERSHIP; DR. STUART GOTHOLD, SUPERINTENDENT OF LOS ANGELES COUNTY SCHOOLS; DR. FLORETTA McKENZIE, SUPERINTENDENT OF DISTRICT OF COLUMBIA SCHOOLS IN SUPPORT OF PETITIONER.

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## INTERESTS OF AMICI

This brief amici curiae is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for all parties; the letters of consent have been lodged with the Clerk of this Court.

The identities and interests of amici are as follows:

The National School Safety Center (NSSC) is a nonprofit partnership between the United States Departments of Justice and Education and Pepperdine University. The Center is funded by the federal Office of Juvenile Justice and Delinquency Prevention. This partnership, which the National School Safety Center represents nationwide, was established to promote cooperation between the Nation's legal, law enforcement, and education communities to positively and effectively address the problems of crime, violence, vandalism, discipline, and truancy disrupting our Nation's schools. This case, *Honig v. Doe,* is expected to impact every school where handicapped children are enrolled. The Center and its coamici, with their commitment to ensure safe campuses for all students, hope to positively assist the Court to respond in a most reasonable and effective manner.

The American Association of School Administrators (AASA) is a professional association representing more than 17,000 educational leaders in North America and other parts of the world. AASA is dedicated to enhancing the professionalism of educational leaders who are the key to excellence in our schools and who generally have the ultimate administrative responsibility for supervision of disciplinary practices in schools. AASA members are

responsible for a major proportion of the Nation's 100,000 schools, 2.4 million teachers, and 44 million students. AASA members are directly influenced by court decisions which deal with legal issues, discipline, suspension, and expulsion procedures.

The National Association of Secondary School Principals (NASSP) is a professional organization representing more than 35,000 site administrators for the Nation's middle-level and senior high schools. NASSP's members are directly responsible for the safety and education of our Nation's school aged youth. NASSP members are responsible for a major proportion of the Nation's 100,000 schools, 2.4 million teachers, and 44 million students. They are the line administrators most responsible for the day-to-day implementation of disciplinary practices in the schools. Every court decision regarding student discipline, suspension, and expulsion directly influences the membership of NASSP.

The National Association of Elementary School Principals (NAESP) is a professional organization of more than 23,000 elementary and middle school administrators. Its members are responsible for the education of approximately 25 million elementary school students throughout the country. Court decisions regarding suspension and expulsion of disruptive handicapped children directly affect NAESP members around the country.

The National Alliance for Safe Schools (NASS) is a nonprofit corporation representing a coalition of educators, law enforcers, and others. NASS provides public information, training, technical assistance, research, and publications about school crime prevention. NASS represents 210 school security directors from all 50 states and the District of Columbia. NASS membership is responsible for the safety and well-being of millions of students, teachers, and staff on campuses throughout America. The work of NASS is directly influenced by court decisions regarding student discipline, suspension, and expulsion procedures.



The International Association of Educational Peace Officers (IAEPO) is a professional organization representing a membership of 75 leading professionals from 20 states and 2 foreign countries. IAEPO members are responsible for the safety and well-being of millions of students, teachers, and staff on campuses throughout America. IAEPO members are directly influenced by court decisions which deal with issues of student discipline, suspension, and expulsion procedures.

The National Association of School Security Directors (NASSD) is a professional organization representing a membership of 150 professionals from 30 states. NASSD membership is responsible for the safety and well-being of millions of students, teachers, and staff on campuses throughout America. NASSD members are directly influenced by court decisions regarding student discipline, suspension, and expulsion procedures.

The California State Board of Education is established by Article IX, Section 7 of the California Constitution. It consists of 11 members appointed by the Governor and confirmed by the California Senate. It is charged with adopting rules and regulations for the governance of K-12 schools in California and is the governing and policy determining body of the California Department of Education. Court decisions regarding student discipline, suspension and expulsion proceedings directly impact this board.

The California School Peace Officers Association (CSPOA) has a membership of more than 300 school po-

lice personnel representing 88 school districts throughout California. The members of CSPOA are responsible for the safety of hundreds of thousands of students, teachers, and staff, for enforcement of the law and countless school district policies and procedures. CSPOA's members are directly influenced by court decisions involving student discipline, suspension, and expulsion procedures.

The California Juvenile Officers Association (CJOA) is a professional organization representing juvenile law enforcement officers statewide. The membership includes many officers who have been directly involved in the investigation of criminal incidents on and about school campuses. Many of these incidents have involved students who are educationally handicapped as both victims and perpetrators. Court decisions regarding discipline, suspension and expulsion proceedings for disruptive and dangerous students directly influence its members.

The Sunny Von Bulow National Victims Advocacy Center is a national nonprofit organization whose purpose is to promote responsiveness in the justice system as to the needs and rights of victims of crime. The Court's decision will influence the Advocacy Center's efforts to help protect students from becoming victims of crime.

The Victims Assistance Legal Organization (VALOR) is a national clearinghouse of information for attorneys who represent crime victims, including elementary, junior, and senior high school crime victims. VALOR helps promote safe, secure, and peaceful schools, and recognizes there can be no effective learning without positive campus climates. VALOR believes there will be increased numbers of elementary, junior, and senior high school campus crime victims if the Ninth Circuit Court decision is not reversed.



The Center for Educational Leadership is a university-based consulting and research consortium which provides training to improve the education profession at all levels. This Center helps school, community college and university leaders more effectively function at their individual sites. This Center's clients are directly influenced by court decisions which deal with student discipline, suspension and expulsion proceedings.

Dr. Stuart Gothold is the Superintendent of the Los Angeles County, California, Office of Education. This office is the largest county school agency in the Nation and includes 82 school districts, 1,820 schools, 48,899 teachers, and 1,275,041 students. This office is an advisor for suspension, expulsion, and discipline policies of the 82 districts. Los Angeles County serves the largest special education population in the state of California. Therefore, court decisions, such as *Honig v. Doe* will directly impact this office.

Dr. Floretta McKenzie is the Superintendent of the Washington, D.C., Public Schools. This district includes 184 schools, 5,242 teachers, and 87,677 students. Since every school district in America must adhere to court decisions regarding discipline, suspension, and expulsion procedures, all legal decisions, such as this one, directly influence the Washington, D.C., public schools.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Doe by Gonzales v. Maher* at 793 F.2d 1470 (9th Cir. 1986).

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## STATEMENT OF THE CASE

This case presents issues which affect the ability of a local school district to provide a safe school environment while endeavoring to comply with the Education for All Handicapped Children Act (EAHCA), Public Law 94-142. The case raises the question of whether schools may suspend or expel a special education student for disruptive or violent behavior which endangers the student or others prior to the completion of mandated EAHCA proceedings in order to maintain a safe school environment for all children and staff pending the conclusion of the proceedings.

This case revolves around two emotionally handicapped, violent students. After John Doe attacked several students, his school finally suspended him and undertook expulsion proceedings. Jack Smith was suspended and eventually privately placed after he engaged in repeated acts of theft, extortion and sexual advances toward female students. The conduct of each arose from or were manifestations of their handicaps.

Although these students posed threats to a safe school environment, constitutionally required in the state of California, the Ninth Circuit concluded that the provisions of EAHCA preclude a school from immediately changing the placement of any student whose handicap related behavior endangers himself or others. Under 20 U.S.C. section 1415(e)(3)—the "stay put" provision—the Court held that a student must be maintained in his or her current placement while elaborate and lengthy procedures are followed to implement a change in placement.



Suspension or expulsion of a student, according to the Ninth Circuit, is barred by EAHCA as a change in placement until a multi-disciplinary team (or a hearing officer or court if review is sought) has properly determined whether the misconduct at issue is or is not handicap related. If the misconduct is handicap related, suspension or expulsion would not be permitted, but a change in placement could be pursued using the same elaborate and time consuming process. If the misconduct is not handicap related, the student could be suspended or expelled. The EAHCA process at a minimum takes months and may take several years.

At issue in this case then, is whether the Section 1415 (e)(3) "stay put" provision precludes a local school district from immediately suspending, expelling or changing the student's placement where the student's handicap related behavior endangers the safety of the student or others.

## SUMMARY OF ARGUMENT

Our Nation's schools must not only teach, but they must provide an environment in which to learn—an environment that is safe and welcoming. *In re William G.*, 40 Cal.3d 550, 221 Cal.Rptr. 118, 709 P.2d 1287 (Cal.1985). Children cannot be expected to learn and should not be expected to attend a school where they are victimized whether the aggressor is handicapped or non-handicapped or whether the behavior is handicap or non-handicap related.

The Ninth Circuit's opinion significantly and unreasonably curtails the extent to which schools may deal with misconduct by handicapped students subject to EAHCA. If a handicapped student engages in violence or other serious misconduct directed toward others in the school community, the Ninth Circuit prohibits prompt or effective action. A student may not, under its interpretation, be suspended, expelled or otherwise placed except for a brief period without complying with the procedures contemplated by EAHCA for changes in educational placements. This process, as demonstrated by these very cases, may take literally years to complete. In the interim, the student is returned to the same classroom or placement where the student continues to endanger the safety of the student and others.

The amici urge the Court to reverse the Ninth Circuit's decision. The Ninth Circuit makes it impossible for schools to effectively deal with misbehavior by handicapped students. Two primary arguments are raised by the amici to support the reversal of the Ninth Circuit's opinion:

First, the suspension or expulsion of students for misbehavior that endangers themselves or others does not constitute a change in placement requiring compliance with EAHCA procedures prior to suspension or expulsion even if the misbehavior is handicap related.

Second, even if suspension or expulsion of a student for handicap related behavior constitutes a change in placement within the contemplation of EAHCA, the overriding duty to protect all students so that they may learn on a safe, secure and peaceful campus entitles the Nation's



school officials to suspend, expel or otherwise place students in such circumstances.

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## ARGUMENT

### I

### THE SUSPENSION OR EXPULSION OF STUDENTS FOR MISBEHAVIOR THAT ENDANGERS THEMSELVES OR OTHERS DOES NOT CONSTITUTE A CHANGE IN PLACEMENT REQUIRING COMPLIANCE WITH EAHCA PROCEDURES PRIOR TO SUSPENSION OR EXPULSION EVEN IF THE MISBEHAVIOR IS HANDICAP RELATED

#### A. The Genesis of the "Change in Placement" View.

The Education for All Handicapped Children Act, 20 U.S.C. section 1415(e)(3), provides in part that:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . .

This provision, commonly known as the "stay put" requirement, was construed by the Ninth Circuit as preventing suspension or expulsion of a student, except perhaps for 30 days, without compliance with EAHCA procedural requirements.

The view that suspension or expulsion constitutes a change in placement has as its genesis the case *Stuart v. Nappi,* 443 F.Supp. 1235 (D.C.Conn.1978). The facts of

*Stuart* are clearly distinguishable from the present case. In *Stuart,* not only was there no evidence that the student was dangerous to herself or others, there was a substanial showing that the school contributed to her misbehavior by not monitoring and supervising her special education program. *Stuart* was decided during the infancy of EAHCA and before the law was generally understood. The Court in *Stuart,* in attempting to break new legal ground, misunderstood and misinterpreted the "stay put" provision. Unfortunately, its holding has been reiterated by other courts without actually considering its merit. *See, e.g., School Board of the County of Prince William, Virginia v. Malone,* 762 F.2d 1210 (4th Cir. 1985); *S-1 v. Turlington,* 635 F.2d 342, *cert. denied,* 454 U.S. 1030 (1981); *Kaelin v. Grubbs,* 682 F.2d 595 (6th Cir. 1982). Amici now urge the Court to re-examine these cases and to overrule their holding that suspension or expulsion for disciplinary reasons is a change of placement.

**B. Suspension or Expulsion Does Not Constitute A Change of Placement.**

The "stay put" requirement imposed by the Education for All Handicapped Children Act does not apply to every modification in the services provided to a child. Instead, it applies only to a change *from one special education program to another special education program.* Because expulsion or suspension does not constitute *a special education program or placement,* the "stay put" provision does not apply.

The specific language of Section 1415(e)(3) and the general terms of Section 1415 support the argument that



the "stay put" requirement has limited applicability. Section 1415(e)(3) makes reference to "educational placement" and to "proceedings conducted pursuant to this section." Elsewhere in Section 1415, however, additional, different proceedings are considered. For example, Section 1415(b)(1)(E) requires that EAHCA procedures must provide:

> An opportunity to present complaints with respect to any matter relating to the identification, evaluation, *or* educational placement of the child, *or* the provision of a free appropriate public education to such child. (Emphasis added.)

The "stay put" requirement applies only to changes in "educational placements." It does not apply, for example, to ceasing "the provision of a free appropriate public education to such child." Had Congress intended to more broadly impose the "stay put" requirement, it would have used the chain of phrases otherwise contained in Section 1415.

The EAHCA regulations support this statutory interpretation as well. The regulations paraphrase the "stay put" requirement, referring to *educational* placement. 34 C.F.R. section 300.513(a). Under EAHCA regulations, moreover, the term "placement" refers to the educational program which can implement the goals and objectives of the student's individualized educational program (IEP). 34 C.F.R. sections 300.552(a)(2), (b). Suspension or expulsion of a student from his or her special education placement is not subject to Section 1415(e)(3) because *suspension or expulsion is not an educational program or placement;* it is not fashioned to implement a student's individualized goals or objectives.

### C. Suspension or Expulsion Constitutes a Normal Procedure For Dealing With Misbehavior And Is Permitted by EAHCA.

The Education for All Handicapped Children Act was adopted to provide financial incentives to states and their schools to make special services available to handicapped children. It was not designed to prevent schools from maintaining a safe school environment where a handicapped student's behavior constitutes a danger to others. *See Doe v. Brookline School Committee,* 722 F.2d 910 (1st Cir. 1983); *Jackson v. Franklin County School Board,* 765 F.2d 535 (5th Cir. 1985); *Victoria L. v. District School Board of Lee County, Florida,* 741 F.2d 369 (11th Cir. 1984).

The regulations of the Department of Education implementing Section 1415(e)(3) recognize that: "While the placement may not be changed, this does not preclude the agency [a school] from using its normal procedures for dealing with children who are endangering themselves or others." 34 C.F.R. section 300.513 (comment).

Suspension or expulsion of a student from a regular school program or special placement is a normal, widely used and clearly effective disciplinary method. When a student is endangering himself or herself, suspension or expulsion is often the school's only sensible response. Exclusion is proper when a child—handicapped or not—has a contagious or infectious disease where there is a substantial risk of contagion to other students. *See e.g.* California Education Code sections 48211-48214; *New York State Association of Retarded Children, Inc. v. Carey,* 466 F.Supp. 479 (E.D.N.Y.1978). EAHCA does not require such children to "stay put" and thereby endanger others.



To its credit, the Ninth Circuit concluded that suspensions for two or five days, and by dicta, even 30 days would be a normal and acceptable way to deal with even handicapped children endangering themselves or others. 793 F.2d 1484-85. According to that Court, "it gives school officials some needed breathing space for developing strategies to cope with the child during the pendency of any ensuing review proceedings." 793 F.2d at 1485. But on what basis under EAHCA is a 30-day suspension not a change in placement and, perhaps, 31 days such a change? There is no basis for such a rule. The EAHCA evaluation and review procedures (which may include several layers of school or state administrative hearings or reviews and ultimately court action) can take years. Limiting the "normal" procedures for dealing with children who are endangering themselves or others to 30 days or any specific time is arbitrary and unreasonable. A school must not be compelled to return students to their pre-misbehavior placements when their return endangers themselves or others.

### D. Schools Should Be Required to Deal Fairly But Promptly and Effectively With Students Endangering Themselves or Others.

The amici do not dispute that children suspended or expelled from school should be dealt with fairly. Our Nation's schools, for example, have willingly conformed to the due process protections described by the Supreme Court in *Goss v. Lopez,* 419 U.S. 565 (1975) and *Wood v. Strickland,* 420 U.S. 308 (1975). Inherent in these decisions, however, is that while fairness is dictated, schools must be permitted to deal with students promptly and effectively as well. This need is no less significant when handicapped children are involved.

The Ninth Circuit requires that, except for a brief period, a student whose handicap related behavior endangers the student or others must be allowed to participate in the student's current educational placement pending EAHCA procedures. Such a requirement inappropriately denies school officials a prompt and effective means to deal with dangerous situations.

The Ninth Circuit acknowledged in its opinion that "federal law respecting the educational rights of handicapped children is not a model of clarity," but courts "must confront those questions fairly presented to them." 793 F.2d at 1496. Just how should schools deal with handicapped students when they endanger others?

The amici believe that a workable method to deal with misbehavior by handicapped students with a sensitivity to their rights under EAHCA may involve the following:

- When a handicapped student engages in misbehavior which endangers the student or others, schools should be permitted to suspend the student subject only to the requirements imposed by *Goss v. Lopez, supra,* and consistent with general due process protections afforded under state law. *See, e.g.,* California Education Code section 48915.5 *et seq.* During this time (which the Ninth Circuit acknowledged was needed) schools can consider how best to proceed with respect to the student.
- While the temporary suspension continues (which the Ninth Circuit suggests could continue for some 30 days), schools could convene a multi-disciplinary team qualified to develop student individualized educational placements (IEP's) to consider whether the misbehavior was or was not a manifestation of the student's handicap and also whether a student may or may not safely remain in school.



- If a determination is made by the multi-disciplinary team that the misbehavior *was not* a manifestation of the student's handicap, the school would be entitled (as the Ninth Circuit found) to deal immediately with the student in the same manner as a non-handicapped student. *See, e.g.,* California Education Code section 48900 *et seq.* Very simply, the student could be suspended further or expelled during which time the school (if it chooses) "may cease providing all educational services to the student—just as it could in any other case." 793 F.2d at 1482. When a student seeks review of the determination that his or her misconduct was not handicap related, the school would be entitled to continue the suspension or expulsion. *See, e.g.,* California Education Code sections 48911(g) and 48915.5(g).
- If a determination is made that the misbehavior *was* a manifestation of the student's handicap, the school should, through an appropriate hearing or multi-disciplinary conference, consider whether the student continues to pose a threat to himself or herself or to others. The student and the student's parent or guardian would be given notice and an opportunity to be heard when this question is considered. This may be periodically reviewed. So long as a threat exists, the school should have the prerogative of suspending or expelling the student.
- When a student is suspended or expelled, the school or the student's parents may consider and pursue a modification in the student's placement or provide an alternative program, such as independent study. If a change is agreed to, it could then be implemented. If not, the student would remain suspended or expelled until the EAHCA procedures needed to approve the modification are concluded. Parents would not be permitted to utilize lengthy EAHCA procedures to effectively immunize their child from suspension or expulsion where the child endangers the child's own safety or the safety of others.

The Ninth Circuit rejects these suggestions insofar as they would allow a student's suspension or expulsion for handicap related behavior which endangers the student or others unless EAHCA procedures are followed. It makes two suggestions for dealing with students in these circumstances:

First, the Ninth Circuit suggests that a school use "normal procedures" which would not constitute a "change in placement." It notes, however, that the time between what is an acceptable procedure and what is not is a difficult one to draw. 793 F.2d at 1486. The amici have previously argued that suspension or expulsion are acceptable normal procedures. In view of the lack of a bright-line test, the Ninth Circuit takes a somewhat crabbed view that "normal" is a timeframe of 30 days or less. By restricting the ability of schools to deal with perhaps life-threatening situations, the Ninth Circuit provides only the most temporary of solutions which leave other children and school staff at risk of further harm at the hands of the dangerous student who returns to the same placement *before* the problem is resolved.

Second, the Ninth Circuit suggests that an injunction or other temporary order allowing for a change in the student's placement, suspension or expulsion may be obtained while the EAHCA procedures are pursued. 793 F.2d



at 1486. Most schools do not have on-staff attorneys. A requirement to petition a court for an injunction or other temporary order would be unduly burdensome. The Supreme Court has consistently avoided making the relationship between schools and students or their parents any more adversarial of legalistic than absolutely necessary. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Further, the Supreme Court has consistently recognized that procedures should be suited to the circumstances involved. A judicial or even formal hearing is not always required. *See, e.g., Goss v. Lopez, supra.* The amici believe that it would be more appropriate for a school or a multi-disciplinary team to evaluate a student's behavior rather than a court. Authority for suspension, expulsion or change in placement should be placed with those who are in the best position to evaluate the circumstances. The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

The extended procedures expected by the Ninth Circuit are inappropriate regardless of whether dangerous misbehavior is or is not a manifestation of the student's handicap. Prompt and effective action must be permitted where safety considerations warrant.

## II

## EVEN IF SUSPENSION OR EXPULSION OF A STUDENT FOR HANDICAP RELATED BEHAVIOR CONSTITUTES A CHANGE IN PLACEMENT WITHIN THE CONTEMPLATION OF EAHCA, THE OVERRIDING DUTY TO PROTECT ALL STUDENTS SO THAT THEY MAY LEARN ON A SAFE, SECURE AND PEACEFUL CAMPUS ENTITLES SCHOOL OFFICIALS TO SUSPEND, EXPEL OR OTHERWISE PLACE STUDENTS IN SUCH CIRCUMSTANCES

### A. Students and Staff Have a Right To Attend Schools That Are Secure and Peaceful; School Administrators Have an Obligation To Protect Students and Staff From Violence.

After the facts that gave rise to this petition occurred, the Nation's courts emphasized the need for school safety. An appropriate perspective was given by Justice Lewis Powell in *New Jersey v. T.L.O., supra,* in which he, joined by Justice Sandra Day O'Connor, stated in a concurring opinion that:

> Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has an obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. 469 U.S. at 350.

This obligation applies whether the mistreatment arises from the behavior of handicapped or non-handicapped students and whether the behavior is or is not a manifestation of a handicap.

Throughout the Nation, the need to protect those subjected to mistreatment has been the topic of extensive litigation. *See generally,* J. Rapp, F. Carrington, and G. Nicholson, *School Crime and Violence: Victims' Rights* (National School Safety Center, 1986). Handicapped students, often because of their handicaps, are particularly unfortunate victims of school crime or violence. A school must exercise reasonable efforts to protect the handicapped from mistreatment or from becoming victims of school crime and violence, whether intentional or negligent. *See, e.g., Collins v. School Board of Broward County,* 471 So.2d 560 (Fla.App.4Dist.1985), *mandamus dismissed,* 491 So.2d 280 (Fla.1986) (sexual assault of handicapped student during a class); *Rodriguez v. Board of Education of City of New York,* 480 N.Y.S.2d 901 (A.D.2Dept.1984) (handicapped student injured where teacher negligent in failing to supervise playground). The common law of California supports this view. *See Dailey v. Los Angeles Unified School District,* 2 Cal.3d 741, 87 Cal.Rptr. 376, 470 P.2d 360 (1970).



The responsibility to provide safe schools follows from the common law rule that a parent or other person in control of a child has a duty to prevent the child from intentionally harming others or conducting himself or herself in a manner which would create an unreasonable risk of harm to others. *See* Restatement (Second) of Torts, section 315. The Ninth Circuit has held school administrators may have a duty to prevent students from endangering even themselves. *See Kelson v. City of Springfield,* 767 F.2d 651 (9th Cir. 1985).

The important need for schools to respond to safety considerations has been recognized in the employment context. Although school employees under some circumstances are entitled to a pretermination hearing, the Su-

preme Court has suggested that immediate suspension is allowed "in those situations where the employer perceives a significant hazard in keeping the employee on the job . . . ," such as preventing an incompetent person from driving school buses. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). Safety considerations are no less significant here.

In the recent case of *Bethel School District No. 403 v. Fraser,* 478 U.S. — (1986) the Supreme Court concluded that schools have the prerogative to regulate student speech which is lewd, indecent or offensive. Notwithstanding even the First Amendment, schools are entitled to protect minors from exposure to vulgar language. If the balance of constitutional rights in the school setting tips toward a need to protect a student's morals, surely contractual or statutory rights of handicapped students under EAHCA should yield to the rights of other students and employees to physical safety.

The Ninth Circuit's decision in this case makes it extremely difficult, if not impossible for schools to carry out their obligation to students and staff to protect them from other students whom they know are violent. As previously argued, neither EAHCA nor its regulations require this.

### B. California's Current Constitutional Right To Safe Schools As Adopted By The Voters In 1982 Must Take Priority Over Any EAHCA Obligation.

The Education for All Handicapped Children Act establishes a voluntary rather than mandatory program. Financial incentives are afforded where states assure that all handicapped children have available to them a free, appropriate public education which emphasizes special



education and related services designed to meet their unique needs. Established programs contract with the federal government to receive funding. Since 1982, any contract between a state and the federal government pursuant to EAHCA should be viewed as subordinate to the constitutional right to campuses that are safe, secure and peaceful.

The voters of California in 1982 approved what is commonly known as "The Victims' Bill of Rights." *See* Proposition 8, June, 1982, California Primary Ballot. In its preamble, the measure declares that safeguards for victims' rights are necessary "so that the public safety is protected and encouraged . . ." Cal. Const. Article I, section 28(a). In addition, the provision states that "[s]uch public safety extends to public . . . school campuses where students and staff have the right to be safe and secure in their persons." Cal. Const. Art. I, sec. 28(a).

Among the specific rights guaranteed by "The Victims' Bill of Rights" is the right to safe schools. The safe school provision states that:

> All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful. Cal. Const. Art. I, sec. 28(c).

The Supreme Court of California has upheld the validity of this measure. *Brosnahan v. Brown,* 32 Cal.3d 236, 186 Cal.Rptr. 30, 651 P.2d 274 (1982). By establishing this inalienable constitutional right, the voters of California intended students and staff to be free from school crime and violence, including assaults of the type presented here in the cases of John Doe and Jack Smith.

Although it has been debated whether a right to safe schools exists as a matter of federal constitutional law, that issue need not be resolved in this case. *See generally,* K. Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right,* 14 Pac.L.J. 1309 (1983). The right has existed under state constitutional law since 1982 and such right is preeminent to any contractual or other obligation to which a state or school may be subject to under EAHCA. *People v. Parks,* 58 Cal. 624 (Cal.1881); *Lake Tahoe Railway & Transportation Co. v. Roberts,* 168 Cal. 551, 143 P. 786 (Cal.1914). The suspension or expulsion of dangerous students is, the amici believe, consistent with EAHCA. If not, the will of the people of California should be given effect even if this limits participation in EAHCA plans.

The Ninth Circuit has failed to consider the impact of California's new constitutional right to safe schools. Where such a specific constitutional right exists, the Supreme Court should determine its impact. To do otherwise would deny a fundamental right to those students and staff (not present before the Court) who may be victimized by students who, because of the Ninth Circuit's interpretation of EAHCA, are returned to school while they endanger themselves or others.

## CONCLUSION

The Education for All Handicapped Children Act serves very worthy purposes. Of at least equal and, the amici argue, superior importance, is the need for schools to maintain a safe and welcoming environment in which



teachers may teach and students may learn. Where a handicapped student engages in behavior which endangers the student or others, the goals of EAHCA and the need for a safe school environment naturally come into conflict. These conflicting interests must be balanced and a standard of reasonableness and common sense applied.

To maintain safe schools, a dual system of student control is unacceptable. It is unreasonable to allow a school to suspend or expel non-handicapped students for behavior which endangers the student or others, and to refuse to allow a school to suspend or expel handicapped students for the same dangerous behavior. Such a system is contrary to the fundamental interests of equality upon which this Nation is founded and unreasonably restricts school operations. The return of a handicapped student bent on crime or violence to a classroom or placement with other handicapped students sets the stage for further victimization of those students.

Failure to provide school administrators with adequate latitude to deal with disruptive special education students will only encourage them to place exceptional students in more restrictive educational environments in order to protect other school staff from liability and protect staff and students from further harm. Although this is opposite of EAHCA's intent, this is the effect the Ninth Circuit's decision will subsequently have on school officials if this decision is not overturned.

The Ninth Circuit has been liberal in allowing a temporary suspension to afford a school "breathing space". Rather than limiting schools to a few days, the Ninth Circuit contemplated as many as 30 days. While other courts

have insisted that special education services continue to be afforded to students whether behavior is or is not a manifestation of a student's handicap, the Ninth Circuit allowed services to be terminated under certain circumstances. The Ninth Circuit errs, however, by prohibiting students from being suspended or expelled when a student engages in handicap related misbehavior which endangers the student or others unless time consuming and elaborate EAHCA procedures are employed or parental consent is given. This requirement is intolerable to the Nation's schools and, therefore, the amici urge that the decision of the Ninth Circuit be reversed.

Dated: April, 1987

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

MOTION FILED
APR 30 1987

No. 86-728

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1986

BILL HONIG, California Superintendent of Public Instruction
*Petitioner,*

VS.

JOHN DOE and JACK SMITH
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.**

## MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT IN SUPPORT OF PETITIONER'S MOTION TO REVERSE

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## QUESTION PRESENTED

1. Whether the "stay put" provisions of the Education for All Handicapped Children Act, Pub. L. 94-142, 20 U.S.C. Sections 1401 *et seq.*, preclude a local school district from immediately changing the placement of a child whose handicap-related behavior endangers himself or others.

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No. 86-728

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1986

BILL HONIG, California Superintendent of Public Instruction
*Petitioner,*

VS.

JOHN DOE and JACK SMITH
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT IN SUPPORT OF PETITIONER'S MOTION TO REVERSE THE JUDGMENT OF THE NINTH CIRCUIT

The San Francisco Unified School District hereby moves the Court for leave to file the accompanying brief as amicus curiae in support of petitioner Bill Honig's motion to reverse the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986). The respondents, John Doe and Jack Smith, through their counsel of record have refused to consent to the filing of an amicus brief in support of petitioner's motion to reverse the decision of the Ninth Circuit.

The San Francisco Unified School District (hereinafter "SFUSD"), is a school district authorized under the Education Code of the State of California. The SFUSD is currently educating 5,572 educationally handicapped students, so classified pursuant to the Education of All Handicapped Children's Act, Pub. L.

94-142, 20 U.S.C. § 1401, et seq. (hereinafter "EAHCA"). These students are placed in 110 facilities throughout the SFUSD.

For the following reasons this Court should reverse the decision which construes the "stay put" provisions of the EAHCA, 20 U.S.C. § 1415(e)(3), as precluding a local school district from immediately changing the placement of an educationally handicapped child whose behavior endangers himself or others.

First, the decision by the Ninth Circuit is contrary to decisions in other circuits. Second, the decision of the Ninth Circuit improperly interprets the intent and requirements of the "stay put" provisions of the EAHCA. Third, if an educationally handicapped student becomes a danger to others because of a manifestation of his handicap, the decision of the Ninth Circuit makes it virtually impossible for school districts to adequately protect other students.

The decision by the Ninth Circuit in this case has far reaching implications. It is essential that this Court be addressed by those on the front lines of the educational system that actually have had experience with the problems created by the restrictive interpretation of the "stay put" provisions. The San Francisco Unified School District requests this opportunity to address the Court on an issue fundamental to the safety of both special education and regular education students.

The SFUSD was not a named defendant in the case below, but individuals associated with the SFUSD were individually and officially named. At the time the decision of the Ninth Circuit was rendered the SFUSD considered filing an appeal. However, the costs of filing a petition for Writ of Certiorari and the likelihood of acceptance by the Court dissuaded the SFUSD from filing. Now however, since the grounds upon which the Court will consider this case are narrow and well defined, the SFUSD wishes to file this amicus brief. Further, the Attorney General of the State of California has requested that the SFUSD seek to file as amicus curiae.



The San Francisco Unified School District respectfully moves the Court to grant it permission to file the attached brief as an amicus curiae in support of petitioner's motion to reverse.

Dated: April 30, 1987

Respectfully submitted:

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BILL HONIG, California Superintendent of Public Instruction
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v.

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*Respondents.*

**On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.**

## BRIEF OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT AS AMICUS CURIAE

### INTEREST OF AMICUS CURIAE

The San Francisco Unified School District (hereinafter "SFUSD") is a school district authorized under the Education Code of the State of California. Currently enrolled at 110 of the SFUSD's facilities are 5,572 students classified as educationally handicapped pursuant to the Education for All Handicapped Children's Act (hereinafter "EAHCA"). To meet the needs of educationally handicapped students, school districts must have flexibility in placing these students. The mechanistic approach taken by the Ninth Circuit prevents the SFUSD's from delivering appropriate educational services to these students.

The incident which gave rise to the instant litigation is but one example of an on-going problem facing the SFUSD and other school districts throughout the United States. Briefly, John Doe was an educationally handicapped student placed in a special education school operated by the SFUSD. The students at the



school were predominantly docile children with "Downs Syndrome." John Doe was significantly larger in stature and stronger than these students and did not suffer from similar physical and mental disabilities.

Following two incidents involving the strangling of other students and the breaking of a plate glass window, the principal of John Doe's school suspended him and subsequently recommended John Doe for expulsion. Upon the granting of a temporary restraining order by the District Court, Doe was allowed to return to school, but with a "bodyguard" or custodian assigned to prevent him from attacking other students. Doe was then allowed to remain in his current placement until a subsequent incident removed him from the jurisdiction of the school district.

In the decision below, *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), the Ninth Circuit suggested that in response to Doe's violent acts, the school district could have suspended Doe for up to twenty days and during this period, sought an injunction to allow a change in placement. Slip. Op. p. 25. This suggestion overlooks the fact that the twenty day suspension period is a maximum to an entire school year. Cal. Educ. Code § 48903. If, for example, a disruptive child had previously been suspended for a total of 18 days, the school district would have but 2 days to assess the situation and obtain an injunction.

More significantly, the Ninth Circuit's decision forces a school district to use suspension, a disciplinary tool, as a stop-gap measure rather than allowing schools to move the student temporarily to an alternative educational placement. For children whose disruptive behavior is a manifestation of their handicap, disciplinary measures such as suspension may not be appropriate. A suspension may not correct the problem and results in interrupting the child's schooling. The child's best interests would be served by allowing schools the discretion to put the child in an alternate placement pending review of the child's program, rather than discontinuing the child's education through the suspension. The Ninth Circuit's approach is mechanistic and impairs the school's ability to determine the method of education best suited for the student.

## JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 11, 1986 affirming in part, reversing in part, and modifying in part the judgments of the United States District Court for the Northern District of California dated December 2, 1983, April 23, 1984 and May 24, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Education for All Handicapped Childrens' Act, Pub. L. 94-142, 20 U.S.C. §§ 1401 *et seq.*[1] Also relevant are federal regulations implementing or relating to the procedural safeguard provisions found under 20 U.S.C. § 1415. Those regulations are found at 34 C.F.R. §§ 300.513, 300.552, and are reproduced in Appendix A.

## STATEMENT OF THE CASE

The statement of the case is incorporated in this brief as presented by petitioner, Bill Honig and by amicus curiae Davis Joint Unified School District, et al., amicus curiae.

## SUMMARY OF ARGUMENT

The Ninth Circuit and other authorities have held that a suspension for a fixed and temporary period of time does not constitute a change in placement. Therefore, removal of a student from a current placement to a more restrictive program for a fixed and temporary period of time, where the student is still receiving educational services, should not constitute a change in placement under the EAHCA. The Ninth Circuit's decision is unsound. First, suspending a child is more restrictive than placing him in an interim placement.[2] Second, forcing a school to choose between

[1] All section references are to the EAHCA, 20 U.S.C. § 1401, *et seq.*

[2] All gender references will for convenience be masculine. However, female students do suffer from similar problems.



leaving a dangerous child in an unsuitable placement or suspending him ignores the best interests of the child.[3] Third, the Ninth Circuit overlooks the best interests of the other children in the same placement with the dangerous child.

## ARGUMENT

In *Doe v. Maher*, the Ninth Circuit ruled that once the parent invokes the EAHCA's procedural protections, the student must remain in the original placement pending administrative and judicial review. Slip. Op. p. 25. The Court also held that the EAHCA's "stay put" provision (§ 1415(e)(3)) prohibits a school district from suspending a dangerous student *indefinitely* pending other disciplinary action because that would be a change in placement. Slip. Op. p. 25. The Court approved temporary fixed term suspensions of up to 20 days. The Court did not address the question of whether *temporarily* transfering a student to another placement pending EAHCA review constituted a change in placement.

The situation we address is this: A student with no history of endangering himself or others become dangerous because of a manifestation of handicap; before a new Individualized Education Program (hereinafter "IEP") is created and before judicial relief may be obtained the school district wishes to move the student to another placement (rather than suspend him), but the parents do not. The question is, may the student be placed in an alternative placement in the interim, or must he either be suspended or returned to the situation where he poses a danger?

We urge the Court to provide guidance regarding (1) what flexibility educators have in placing a dangerous student in an alternate program for a fixed period of time; and (2) what constitutes exigent circumstances justifying a preliminary injunction allowing a school district to continue the alternative placement pending a final administrative or judicial decision.

[3] "Dangerous" is used to describe a student who may be a danger to himself or to other students.

### A. What Consitutes A Change In Placement?

Courts have varied in their interpretations of what may or may not constitute a change in placement. A change in the method of transporting a student to and from school may be a change in placement, but a change of teachers is not. *De Leon v. Susquehana Community School District*, 747 F.2d 149 (3rd Cir. 1984). A transfer from one school to another may be a change in placement. *Wilson v. Marana Unified School District*, 735 F.2d 1178 (9th Cir. 1984), (transfer not a change because new placement better suited needs of child) *Tilton v. Jefferson Co. Board of Education*, 705 F.2d 800, 805 (6th Cir. 1983), held, change in placement because programs at new school "not comparable" to original school).

Courts have also defined a change in placement as turning on whether the decision was "likely to affect in some significant way the child's learning experience" or whether the change involved a "substantial programatic modification." *De Leon v. Susquehana*, 747 F.2d at 153, *Lamont X v. Quisenberry*, 606 F.Supp. 809, 814 (S.D.Ohio 1984).

The only generally accepted rule is that a suspension for a fixed period is not a change in placement, but that an expulsion, if for behavior which is a manifestation of the student's handicap, is a change in placement. *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982), (suspension.); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), (expulsion.)

The above cases do not address the situation where a school wishes to transfer a dangerous student from the current placement to an alternate placement for a temporary period of time either to protect other students or the dangerous student. This type of transfer should not be held to be a change in placement subject to the "stay put" requirements of § 1415(e)(3), just as a suspension for a fixed period of time does not invoke the "stay put" rule. An interim placement does not cause a "termination of educational services", *S-1 v. Turlington, supra*, nor does it preclude the student from taking part in special education programs. *Stuart v. Nappi*, 443 F.Supp. 1235 (D.Conn. 1978). Further, since the proposed transfer is only pending injunctive relief, the child's



program has not been "substantially modified," nor will the child's education be "significantly affected." Therefore, this Court is urged to find that the temporary transfer of a dangerous student, pending injunctive relief, is not a change in placement which would trigger the "stay put" requirements.

### B. Schools Should Be Allowed To Alter Immediately The Placement Of A Student Whose Dangerous Behavior Is Inconsistent With Their Current Placement

#### 1. The Child's Best Interest Will Be Served By Allowing An Interim Placement

Two circuits hold that where exigent circumstances exist compelling removal of a handicapped child from his placement, the "stay put" provisions of the EAHCA do not apply. *Jackson v. Franklin Co. School Board*, 765 F.2d 535 (5th Cir. 1985); *Victoria L. v. District School Board of Lee County*, 741 F.2d 369 (11th Cir. 1984). Under these cases a school district may temporarily place a dangerous child in an interim educational setting while an appropriate placement is devised.

In *Doe*, the Ninth Circuit disagrees. The *Doe* court provides us only with one mechanistic set of alternatives, namely, to suspend the student or maintain the status quo. Slip.Op. p. 25, citing § 1415(e)(3).

This rule is unsound for at least four reasons. First, placing a child in an interim educational setting is less restrictive than suspending him. Like other courts, the Ninth Circuit itself recognizes that a suspension does not invoke the "stay put" provisions. Accordingly, it is anamolous to apply the "stay put" provisions when a school chooses the less restrictive alternative of continuing the child's schooling in an interim setting.

Second, forcing the school to choose between leaving a dangerous child in an unsuitable placement or suspending him ignores the best interests of the child. Suspension or other discipline may not be the appropriate method for correcting the student's problem and further, suspension disrupts his schooling. It may be that the student should be removed from regular classes to special classes or from one type of special class to another. The child's

interests may be better served by this type of interim placement which allows his education to continue.

Third, the Ninth Circuit rule overlooks the best interests of the other children in the same placement with the dangerous child. In the instant case, before John Doe became violent, he was placed in a school with "Downs Syndrome" children. Doe was much larger and stronger than these smaller, docile children. Allowing the dangerous student to remain in the original placement, even with a teacher's aide assigned to watch him, effectively "changes" the educational program of the non-violent children from a peaceful one to a dangerous one.

Fourth, a program which was at one time suitable for the dangerous student when he was non-violent has now become unsuitable because of the student's dangerous behavior. The student has actually had a *de facto* change in placement simply because of his now inappropriate behavior. Requiring the student to "stay put" just exaserbates the situation by leaving the student in an inappropriate environment.

Congress could never had intended these results.

### 2. An Interim Transfer Will Give Schools Flexibility

Schools need flexibility in handling their students. *Board of Educ. of the Hendrick Hudson Central School District Board of Educ. v. Rowley* (1982) 458 U.S. 176. Schools must have the discretion to temporarily transfer a student while seeking judicial relief. If a parent wants to protest a change in a student's placement they may still do so, but that should not trigger an automatic return to the original placement. So long as the school is providing the type of educational services generally approved for special education students, a temporary change in placement should not require EAHCA review.

The Ninth Circuit's suggestion that a school will have the 20 day suspension period to obtain judicial relief also fails to recognize that in many cases the school will *not* have 20 days available. If the student has not been previously suspended during the school year, the school will have 20 suspension days available. However, if the student has been suspended previously that year,



for 18 days, for example, then the school will only have *two* days to obtain injunctive relief. Cal.Educ. Code § 48903. Further, the full 20-day period may not be enough time to obtain the preliminary injunction. If an appeal is taken, the 20-day period will certainly not provide enough time for any appeal to be heard.

In order to obtain a preliminary injunction, the school would have to demonstrate those "exigent circumstances" justifying the change in placement. Slip.Op. p. 25. If the Court determines there are no exigent circumstances which justify the alternate placement, the student will be returned to his original placement. With this requirement, parents, schools and Congress will be assured that the judicial process will not unduly delay the placement of the student in the appropriate program.

In exercising their inherent equitable powers the courts may order a change in placement if a child is a danger to himself or others. *Jackson v. Franklin Co. School Board,* 765 F.2d 535 (5th Cir. 1985); *Victoria L. v. District School Board of Lee County,* 741 F.2d 369 (11th Cir. 1984). *Doe v. Brookline School Committee*, 722 F.2d 410 (1st Cir. 1983). Schools should be allowed the same flexibility on a limited basis. Congress could not have intended to burden schools with the rigid requirement that no matter how dangerous a student, once normal disciplinary actions have run their course, a student must be returned to his original placement. *Doe v. Brookline School Committee*, 722 F.2d at 918. Yet, that is exactly what the Ninth Circuit has held. The disruption to other students, the lack of proper placement for the dangerous student, as well as the potential liability and direct out-of-pocket costs to the school district are all results which Congress could not have intended.[4]

## CONCLUSION

It was not Congress' intent "to deprive local school boards of their traditional authority and responsibility to ensure a safe

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[4] To assign an aide to a disruptive student ordered back into the original placement currently costs the SFUSD $7.42 per hour or in excess of $8,000 per child per 180 day school year.

school environment." *Victoria L. v. District School Board*, 741 F.2d at 374. Schools must be given the flexibility to conduct the educational process in a proper manner. When a special education student is a danger to himself or others his placement is not appropriate. Schools must have the discretion to alter an educationally handicapped student's placement to one where the student will not be a danger and where the student may receive a free appropriate public education in the least restrictive environment available.

For the reasons stated above, it is respectfully requested that the decision by the Ninth Circuit be reversed to the extent that it deprives school authorities of the flexibility to meet the demands of a student who is a danger to himself or others.

DATED: April 30, 1987.

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## Appendix A

34 C.F.R. § 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

*Comment.* Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

34 C.F.R. § 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually.

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home:

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

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June 22, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-728

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,
*Petitioner,*
v.
JOHN DOE and JACK SMITH,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, THE COUNCIL FOR EXCEPTIONAL CHILDREN, THE EPILEPSY FOUNDATION OF AMERICA, THE NATIONAL ALLIANCE FOR THE MENTALLY ILL, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE NATIONAL MENTAL HEALTH ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

## INTEREST OF *AMICI CURIAE* [1]

*Amici curiae* are eight organizations of parents of handicapped children, disabled adults, mental disability and special education professionals and advocates who are

[1] Letters of Consent to the filing of this Brief have been lodged with the Clerk of the Court.

concerned that all children with handicapping conditions receive the educational services that are appropriate to meet their needs and to which they are entitled.[2] These

[2] *Amici* include:

(1) The American Association on Mental Deficiency (AAMD), the nation's oldest and largest interdisciplinary organization of professionals working exclusively in the field of mental retardation. AAMD, founded in 1876, has nearly 10,000 members today from a wide variety of disciplines who work with people with mental retardation in education, institutional and community settings;

(2) The American Orthopsychiatric Association, an interdisciplinary organization of more than 8,000 members, including psychiatrists, psychologists, social workers, psychiatric nurses, educators and allied professionals, concerned with the problems, causes and treatment of abnormal behavior;

(3) The Association for Retarded Citizens of the United States, a voluntary organization of 300,000 members devoted to promoting the welfare of mentally retarded children and adults;

(4) The Council for Exceptional Children, founded in 1922, the only international professional association dedicated to the improvement of the quality of education for all exceptional children and youth, both handicapped and gifted and talented. The Council's more than 50,000 members are primarily teachers, administrators, teacher educators and providers of education-related services. CEC has local units in each of the United States and the Canadian provinces. As the association representing special educators, CEC develops and promotes policies to assure appropriate services to children and youth in need of special education, publishes professional journals, conducts conferences and establishes professional standards;

(5) The Epilepsy Foundation of America, the only national, charitable, voluntary nonprofit health agency in the United States specifically dedicated to the welfare of more than two million children and adults with epilepsy. Since its inception, the Foundation has worked to ensure that children with epilepsy are permitted to fully participate in educational programs regardless of the severity of their condition or any possible behavioral manifestations;

(6) The National Alliance for the Mentally Ill (NAMI), representing 45,000 parents, spouses and children of mentally ill persons, as well as mentally ill clients themselves. It is organized into state alliances and more than 730 local affiliates. As a family movement, NAMI provides self-help and supportive services, conducts a vigorous educational campaign against the stigma of mental illness, and advocates for increased research on the causes and cures of mental illness and improved treatment and rehabilitative services for those afflicted with serious mental diseases;

(7) The National Association of Social Workers (NASW), a non-profit association with more than 100,000 members and the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice and to improving the quality of life through utilization of social work knowledge and skills; and

(8) The National Mental Health Association, a citizens' organization of one million lay and professional members and supporters whose primary purpose is encouragement of efforts to provide better educational and other services for mentally ill children and adults.



children's handicaps range from mild to severe. All of them are impaired in their ability to learn and many evince behavior problems that are a manifestation of their handicapping conditions.

*Amici* are directly familiar with the devastating effect on handicapped children and on their families of exclusion from school. Failure to serve these children will waste their valuable talent, impede their intellectual and social development and burden society with the unnecessary expense of supporting their continued dependency as adults.

Many of the *amici* organizations actively participated in the congressional hearings preceding enactment of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401-1420 (hereafter "EHA" or "the Act"), and all have been involved in its implementation. They share a commitment to access for all handicapped children to appropriate educational services and to the preservation of Congress' flexible and individualized approach to assuring the education of handicapped children.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case requires the Court to decide two questions: (I) Whether a local school district can unilaterally change the placement of a child because of disruptive behavior caused by his or her handicapping condition in derogation of the stay-put provision of the EHA, which prohibits such changes, and (II) whether the state education agency must provide services to a handicapped child whom the local authority is unable or unwilling to serve.

I. The EHA requires that a handicapped child's educational program and placement be determined by parents, school officials and special education experts through a comprehensive process resulting in a written plan (the "individualized education plan" or IEP) tailored to the unique needs of the child. The Act includes procedures to change the IEP if the placement or program is not working. 20 U.S.C. § 1415(b)-(e). However, to safeguard against the historic pattern of excluding handicapped children who present difficulties for school authorities, the EHA prohibits schools from changing the placement specified in the IEP without parental agreement. 20 U.S.C. § 1415(e)(3). Petitioner seeks to rewrite the law by claiming that school districts have the right to unilaterally change a child's placement if the child is disruptive in school. To permit such a change would effectively nullify the protection provided by the EHA.

*Amici* recognize that school districts have a responsibility to maintain discipline in the school environment. Therefore, when a child is disruptive or endangers himself or other children, teachers and principals need the authority to suspend the child temporarily. But this limited authority must not be expanded into an instrument for excluding handicapped children from the public school system.



The decision of the Ninth Circuit struck a reasonable balance between the school district's need to preserve order and the handicapped child's right to the substantive and procedural safeguards of the EHA. It ruled that suspensions for fixed periods up to 30 days[3] do not amount "to either a change in placement or the deprivation of an appropriate public education." *Doe v. Maher*, 793 F.2d 1470, 1484 (9th Cir. 1986). Indefinite suspension, however, constitutes a significant change in placement. *Id.* at 1483. The court emphasized that school officials cannot "avoid the EAHCA's 'stay-put' provision simply by making a unilateral determination that a child should be suspended indefinitely because he or she threatens to disrupt the educational process." *Id.* at 1486.

Petitioner states that the Ninth Circuit's decision could have appalling consequences. His brief to this Court portrays an explosive, gun-wielding teenager menacing fellow pupils, teachers and school property. Brief for Petitioner at 5, 6. Petitioner implies that the Circuit Court has insulated this child from the rule of law. This is simply not true. School districts retain a range of options for dealing with disruptive pupils—among them adding a teacher's aide (as petitioner did), immediate suspension, an expedited due process hearing or petition to a court for a change of placement, or referral to the juvenile justice or mental health system.

More important, however, the children affected by petitioner's proposed rule are not violent criminals, as he implies. They are children whose behavioral problems are a manifestation of handicapping conditions such as autism, mental retardation, learning disabilities or cerebral palsy. Disruptive behavior may also be a symptom of medical problems or may result from the school's failure to provide adequate therapies or other appropriate services

[3] The 30-day figure was chosen by the court because that is the maximum time authorized under California law for suspensions of fixed duration.

specified in the IEP. Congress mandated that all of these children are entitled to the substantive and procedural safeguards of the EHA. To afford them anything less would render illusory the promises of the Act.

II. The court below also held that a state education agency must provide the services to which a child is entitled when the local educational authority is unable or unwilling to provide those services. This result is required by the statute itself. 20 U.S.C. § 1414(d). A holding to the contrary would leave a child without educational services while state and local agencies wrangle over their respective duties. The statute places the final responsibility for assuring educational services with the state agencies that receive the federal funds. The court below properly interpreted the statute.

## ARGUMENT

### I. THE EHA BARS SCHOOL DISTRICTS FROM UNILATERALLY CHANGING A HANDICAPPED CHILD'S PLACEMENT IN RESPONSE TO BEHAVIOR THAT IS CAUSED BY THE HANDICAPPING CONDITION.

#### A. Changing a Handicapped Child's Placement Over Parental Objection Violates 20 U.S.C. § 1415(e)(3).

The Education for All Handicapped Children Act requires that state and local education agencies provide all handicapped children with a "free appropriate public education," 20 U.S.C. §§ 1412(1), 1414(a)(1)(C)(ii), "regardless of the severity of their handicap." 20 U.S.C. §§ 1412(2)(c), 1414(a)(1)(A); *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 181 n.5. (1982). The Act "arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from public schools." *Burlington School Comm. v. Mass. Dept. of Education*, 471 U.S. 359, 373 (1985). Before its enactment, more than one million



children were deprived of education by such discriminatory practices.[4]

In order to protect children and their parents, Congress enacted Section 1415(e)(3), commonly referred to as the "status quo" or "stay-put" requirement, which mandates that "[d]uring the pendency of any proceedings conducted pursuant to 20 U.S.C. § 1415,[5] unless the State or local educational agency and parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ." This requirement is an important provision of the EHA's interconnected set of procedural protections. *Rowley*, 458 U.S. at 205-06 (procedural requirements of EHA as important as its substantive requirements).

*Amici* recognize that school officials may be under considerable pressure when dealing with a behaviorally disordered handicapped child. Although many innovative forms of intervention have been successful in dealing with a handicapped child who presents behavior problems in a regular classroom setting,[6] researchers have noted that "school personnel have not, as a rule, been aggressive in adapting, implementing, and delivering these in-

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[4] Pub. L. No. 94-142, § 3(a), 89 Stat. 773 (1976) (reprinted in notes to 20 U.S.C.A. § 1401).

[5] 20 U.S.C. § 1415 provides a mechanism whereby parents who disagree with a school's proposed decision concerning the education of their handicapped child, including decisions as to placement, are entitled to an administrative hearing. Any party aggrieved by the decision resulting from the hearing may appeal to either state or federal court.

[6] Examples of recognized techniques include cognitive behavior modification, Harris, "Cognitive behavior modification: Application with Exceptional Students," 15 *Focus on Exceptional Children* 1-16 (1982); timeout procedures, Zabel, "Timeout Use with Behaviorally Disordered Students," 12 *Behavior Disorders* 15-21 (1986); and contingency contracting, L. Polsgrove, "Self-Control: Methods for Child Training," 4 *Behavioral Disorders* 116-30 (1979).

novative practices to the school setting."[7] That is precisely why the Act prohibits school officials from changing the child's placement without parental consent. As one court observed, "We do not impugn the conduct or dedication of these officials by recognizing that the expense of special education programs may perhaps, even unconsciously, lead them to be less than zealous in ensuring the child's right to a free and appropriate education." *Doe v. Brookline School Committee*, 722 F.2d 910, 921 (1st Cir. 1983).

For this reason courts have differentiated between the application of § 1415(e)(3) to parents and to schools:

> We have no quarrel with the proposition that a parent who believes his child is receiving inappropriate service from a local education agency may take unilateral action to change the child's placement prior to the outcome of the administrative processes. This does not, however, mean that the local education agency has the same right; we think that different policy considerations come into play, and that the proper interpretation of (e)(3) as it pertains to the actions of local educational agencies is that in such situations, the provision operates much like a rebuttable presumption that maintaining the original placement is required. This approach both acknowledges the strong wording of the statute—'the child *shall* remain (emphasis supplied)'—while preserving to courts enforcing the EAHCA their 'traditional powers of equity' in fashioning appropriate remedies for apparent violations.

*Lamont X. v. Quisenberry*, 606 F. Supp. 809, 815 (S.D. Ohio 1984).

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[7] Walker, H.M., Reavis, H.K., Rhode, G. and Jenson, W.R., A Conceptual Model for Delivery of Behavior Services to Behavior Disordered Children in a Continuum of Educational Settings, in P. Bornstein and A. Kazden (eds.) *Handbook of Clinical Behavior Therapy with Children* (Homewood, Ill.: Dorsey 1985), p. 704.



*Burlington*, 471 U.S. 359, is the only case this Court has decided dealing directly with the stay-put provision. Although Petitioner claims that *Burlington* merely reflects this Court's willingness to interpret § 1415(e)(3) flexibly, Petitioner's Brief at 13, it is clear that the flexibility was strictly reserved for parents. This Court specifically declared that "at least one purpose of § 1415(e)(3) was to prevent school officials from removing a child from the regular public school classroom over the parents' objections pending completion of the review proceedings." 471 U.S. at 373. The Court emphasized that "section 1415(e)(3) is located in a section detailing procedural safeguards *which are largely for the benefit of parents and the child.*" *Id.* (emphasis added).

Subsequent lower court decisions have cited *Burlington* for the proposition that "correctly construed, § 1415(e)(3) is a bar to removal of a child from the mainstream classroom over parental objection pending review of an IEP that would place a child elsewhere." *Eugene B. Jr. v. Great Neck Union Free School District*, 635 F. Supp. 753, 758 (E.D.N.Y. 1986); *Linkous v. Davis*, 633 F. Supp. 1109, 1116-17 (W.D. Va. 1986).

### B. Unilaterally Changing a Handicapped Child's Placement Vitiates the Intent of the Individual Education Plan and Thus Denies the Child's Right to a Free Appropriate Public Education.

The free appropriate public education mandated by the EHA is defined as, *inter alia*, a program of special education and related services designed to meet each handicapped child's "unique needs," provided in accordance with an individually designed education program or "IEP." 20 U.S.C. § 1401(16) and (18). The IEP is the centerpiece of the Act. It is the blueprint for the child's education, developed collaboratively by qualified special education personnel, the child's teacher, the child's par-

ents or guardian and, whenever appropriate, the child. 20 U.S.C. § 1401(19).

The IEP planning process and the document resulting therefrom together represent a "communication vehicle between parents and school personnel [which] enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be." 34 C.F.R. Pt. 300, App. C (I)(a) (1985). It provides "an opportunity for resolving any differences between parents and the agency concerning a handicapped child's special education needs; first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parents." *Id.* at (b). It is "a commitment of resources" by the school to the child. *Id.* at (c). It is "a management tool . . . used to ensure that each handicapped child is provided special education and related services appropriate to the child's special learning needs." *Id.* at (d). The IEP is also an "evaluation device for use in determining the extent of the child's progress towards meeting the projected outcomes." *Id.* at (f). Finally, it is a "compliance/monitoring document" to gauge whether the school is living up to its promises. *Id.* at (e). Each of these functions of the IEP would be nullified if school districts had the power to unilaterally change a child's placement without regard to the agreements embodied in the IEP.

The IEP, both in itself and in the process of its development, is thus the fulfillment of the promise to provide an individualized education based on each handicapped child's unique needs. Yet Petitioner insists that, regardless of the terms of the IEP, school districts have complete discretion—without further planning, process or parental agreement—to change the placement of a child who manifests behavioral difficulties. Petitioner further asserts that such discretion may be exercised repeatedly



during the course of a school year. Ironically, Petitioner would allow school officials to change the child's placement in response to the same behaviors that led them to identify the child as handicapped in the first place—the very behaviors targeted in the IEP for attention and modification.[8]

The IEP of a child who evinces disruptive behavior that is a manifestation of his handicapping condition should include programs to modify that behavior and goals against which to measure the child's and the school's success. The course contemplated by the EHA to deal with a child whose behaviors continue to be inappropriate or disruptive is to reconvene the IEP team and consider whether revisions of the child's program or placement are needed, including the appropriateness of a more restrictive setting.[9] Permitting school officials to unilaterally change a child's program or placement com-

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[8] In fact, three of the handicaps identified by the regulations to the Act are defined in terms which suggest disruptive behavior. A child who is "seriously emotionally disturbed," for example, may exhibit "[i]nappropriate types of behavior or feelings under normal circumstances," or "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers." 34 C.F.R. § 300.5(b)(8)(B) and (C). A mentally retarded child has "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior . . ." *Id.* at § 300.5(b)(4). An autistic condition is "manifested by severe communication and other developmental and educational problems." *Id.* at § 300.5(b)(7)(i).

[9] The Comments to 34 C.F.R. § 300.552, one of the regulations implementing the EHA, acknowledge that disruptive behavior may be a basis for modifying a student's program—that is, revising the IEP to make it appropriate—rather than for excluding the child from services. Quoting from an analysis of the regulations implementing 29 U.S.C. § 794, it states:

> [I]t should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs.

pletely vitiates the purpose and intent of the IEP process.

### C. Indefinite Suspension or Expulsion Constitutes a Change in Placement.

The court below held that an indefinite suspension or expulsion constitutes a "'change in placement' that triggers the EAHCA's procedural requirements and safeguards [citation omitted]—including the vehicle of the IEP team." *Doe v. Maher*, 793 F.2d at 1483. In doing so it followed uniform case law: *School Board of Prince William County v. Malone*, 762 F.2d 1210, 1214 (4th Cir. 1985); *Kaelin v. Grubbs*, 682 F.2d 595, 599-602 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *Sherry v. New York State Education Dept.*, 479 F. Supp. 1328 (W.D.N.Y. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978), *Doe v. Koger*, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979); *Lamont X. v. Quisenberry*, 606 F. Supp. 809 (S.D. Ohio 1984); *Adams Central School District No. 090, Adams County v. Deist*, 214 Neb. 307, *cert. denied*, 464 U.S. 893 (1983).[10] The weight of authority permits school districts to impose time-limited, short-term suspensions. However, indefinite suspension, exclusion or expulsion constitutes an impermissible change of placement under the Act.

When school officials extrude a child from his classroom and send him home, or to another school, or to an institution, it is certainly a significant change in placement. Such unilateral action by school officials is precisely what the parental involvement in decisionmaking required by the EHA was designed to eliminate.

[10] *See also Board of Education of Peoria v. State Board of Education*, 531 F. Supp. 148, 150-51 (C.D. Ill. 1982) (5 day suspension held not a change in placement, as distinguished from expulsion), and *Mrs. A.J. v. Special School District No. 1*, 478 F. Supp. 418, 432, n.13 (D. Minn. 1979) (finding that expulsion and exclusion are changes in placement, but not suspension). The court in *Mrs. A. J.* specifically interpreted the comment that a school may use its normal procedures for dealing with children who are endangering themselves or others to permit school officials to suspend, but not indefinitely exclude or expel students.



### D. Petitioner's Reliance on Existing Case Law to Support His Proposed Exception to the Stay-Put Requirement Is Misplaced.

Petitioner proposes to rewrite the Act to include a "disruptive child" exception to the stay-put requirement, which would permit schools to unilaterally change students' placements. Petitioner's Brief, p. 8, n.12. To support this proposal, he cites *Victoria L. v. District School Board*, 741 F.2d 369 (11th Cir. 1984), and *Jackson v. Franklin County School Board*, 765 F.2d 535 (5th Cir. 1985), two cases whose analysis rests on the decision in *S-1 v. Turlington*. These cases misinterpret *Turlington*, for it does not in any sense support unilateral change of placement by school districts. Indeed, while the *Turlington* court recognized, as did the court below (793 F.2d at 1484), a school district's right to impose a short-term suspension, it required that expulsion or any other change in placement be accomplished according to procedures set out in the Act. The court quoted the federal regulatory agency's comment to § 1415(e)(3),[11] providing that "*[w]hile placement may not be changed*, this does not preclude dealing with children who are endangering themselves or others" (emphasis added). The school district thus had "very limited authority" to "remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others." The court stressed that a child who was removed *"would of course be remanded to the special change of placement procedures for reassignment to an appropriate placement."* 635 F.2d at 348, n.9 (emphasis added). *Turlington* thus reaffirms rather than limits the protection of the Act.

[11] At the time of the *Turlington* decision, this comment was found at 45 C.F.R. 121a.513 (1975). The comment is now located at 34 C.F.R. 300.513 (1985) in substantially the same form.

### E. The Proposed Exception Is Designed to Serve the Convenience of School Officials Rather than the Needs of Handicapped Children.

The "disruptive child" exception to the mandate of a free, appropriate public education that Petitioner proposes is an exception that would swallow the rule. Depending on Petitioner's definition of "disruptive"—and he proposes to allow school districts to make that finding unilaterally—a substantial number of handicapped children served under the Act could be arbitrarily excluded from its protections.

It must be recognized that the children who would be affected by Petitioner's proposed exception are not the weapon-carrying criminals his brief portrays. They are children whose behavioral problems are a manifestation of their handicapping condition. They include the autistic child who lacks impulse control, the mentally retarded child with poor social adjustment skills, the learning disabled child with motor-control problems, the cerebral palsied child whose frustration may produce self-abusive or aggressive behavior. Sometimes disruptive behavior is a symptom of a medical problem, such as lack of medication or the wrong dosage of seizure-control medication for a child with epilepsy.

For that matter, any handicapped child may have behavior problems as a result of cumulative frustration and confusion when his or her needs are unmet or inadequately addressed. Researchers have acknowledged that the source of handicapped children's behavior problems in school may be inappropriate expectations, curriculum or teaching methods.[12] Courts, too, have recognized the causal relationship between the failure to provide appropriate services and antisocial behavior, e.g.: *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (the school's "handling of [plaintiff] may have contributed

[12] Kerr, M.M., and Nelson, C.M., *Strategies for Managing Behavior Problems in the Classroom* (Merrill, 1983).



to her disruptive behavior"); *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634, 636, 640 (S.D. Tex. 1978) (lack of free, appropriate education was contributing and proximate cause of child's emotional difficulties).

If school officials were permitted to unilaterally transfer children out of the classroom because of disruptive behavior, schools would have no incentive to discover the source of the behavior problem and attempt to remedy it. While the behavior problem would no longer be a difficulty to the school, the child would still need help. In effect, Petitioner asks this Court to strike down the stay-put provision of the EHA not because it is illegal but because it is inconvenient. As this Court has repeatedly emphasized, such a request is more appropriately considered in a legislative forum.[13]

### F. Schools Have Alternative Ways to Deal With Disruptive Students.

Petitioner portrays school districts as backed into a corner by the stay-put requirement, with no alternative but to permit a disruptive child to destroy the decorum of the classroom. That is hardly the case. In fact, § 1415(e)(3) specifically permits school districts to change a child's placement immediately if the parents agree to the new placement. The student must remain in the placement only if parents object to the proposed change.

*Amici* believe that most parents will agree to change a placement that is truly inappropriate. As this Court has noted, the "pages of human experience teach that parents

[13] In *Kleppe v. New Mexico*, this Court responded to a similar request by stating: "What appellees ask is that we reweigh the evidence and substitute our judgment for that of Congress. This we must decline to do." 426 U.S. 529, 541, n.10 (1976). *See also Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 283 (1981), and *New Orleans v. Dukes*, 472 U.S. 297, 303 (1976).

generally *do* act in the child's best interests." *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (emphasis added). Since both the Act and this Court have repeatedly emphasized the importance of the parents' role in assuring an appropriate education for their children, it makes no sense to now give school officials carte blanche to effect a change in placement over the parents' objection.

When parents do not agree to a change in placement, the school district may seek expedited administrative hearings or judicial relief, such as a preliminary injunction ordering a change in placement. *Doe v. Maher*, 793 F.2d at 1486; *Doe v. Brookline School Committee*, 722 F.2d at 917 (courts retain equitable powers and can issue injunctions despite the requirements of § 1415(e)(3)); *Stacey G. v. Pasadena Independent School District*, 695 F.2d 949, 955 (5th Cir. 1983) (same); *Jackson v. Franklin County School Board*, 765 F.2d 535, 538-39 (5th Cir. 1985) (court upheld district court's issuance of a preliminary injunction preventing handicapped student's readmission to school).

Emergency situations may arise, of course, when school officials must act before all parties to the IEP are able to meet. This is why courts have upheld the discretion of school officials to use temporary, fixed-period suspensions. During this time they can meet with parents to work out more appropriate longer-term arrangements. They may also add an extra teacher's aide or monitor,[14] or make changes *within* the child's placement—a change in classes, for example, if the problem is with the teacher or another student in the class.

The decision of the court below strikes a reasonable balance between the rights of handicapped students to

[14] Teachers' aides and monitors are commonly used in classrooms to increase individualized attention given to students. The attitude of the school and the aide determine whether these monitors are perceived as teacher's helpers or "guards", as Petitioner characterizes them. Petitioner's Brief at 11.



special services and district officials' ability to deal with disruptive students and ensure a safe learning environment. It is a balance that gives full weight to the language and the spirit of the "status quo" requirement of the ERA. It should be affirmed by this Court.

## II. 20 U.S.C. § 1414(d) REQUIRES STATE EDUCATION AGENCIES TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION TO HANDICAPPED STUDENTS IF LOCAL EDUCATION AGENCIES DEFAULT IN THEIR DUTY TO PROVIDE SUCH SERVICES.

The court below held that the California educational agency must provide education services directly whenever it determines that a responsible local agency is unable or unwilling to provide free appropriate public education to its handicapped residents. In so doing, the court relied on 20 U.S.C. § 1414(d).[15] *Doe v. Maher*, 793 F.2d

[15] 20 U.S.C. 1414(d) provides:

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

at 1491-92. Petitioner argues that the decision is in error and imposes an insurmountable hardship on the state agency. *Amici* disagree.

The state agency (SEA) is in the best position to compel local school districts to provide necessary services. But if its persuasive efforts do not succeed, the child must not be the one to suffer. The EHA makes clear that the buck stops with the SEA. 20 U.S.C. § 1412(6) states that:

> The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet educational standards of the State educational agency.

*See also* 34 C.F.R. § 300.600 (1985).

In *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), the court considered the role of the state agency in ensuring compliance with the EHA. In that case, the district court had found that the plaintiff was entitled to residential services and, having found the youngster's IEP inadequate, assigned the responsibility of ensuring compliance to the state agency. The court affirmed that decision, finding that it was entirely consistent with the language and spirit of the EHA.

> Both a general congressional perception of the state's primary responsibility to provide a publicly-supported education for all children and a specific intent to centralize this responsibility underlie this explicit statutory mandate.
>
> The legislative history indicates that the full committee considered the establishment of a single agency on which to focus responsibility for assuring the right to education of all handicapped children to be of permanent importance:



> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending on the age of the handicapped child, sources of funding, and type of services delivered. While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.
>
> See S. Rep. No. 168, 94th Cong., 1st Sess. 24 reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1448.

*Id.* at 696.

In reaching its decision, the court below focused on 20 U.S.C. § 1414(d). The court rejected the argument that this provision applies only when groups of children are denied services, since § 1414(d)(3) mandates state intervention when "one or more handicapped children" are unserved. *Doe v. Maher*, 793 F.2d at 1492.[16]

Contrary to Petitioner's assertions, the decision below does not impair the effectiveness of the administrative procedures established by 20 U.S.C. § 1415. The families of handicapped children will still have to utilize these processes to resolve disputes regarding an individual child's "identification, evaluation or placement and the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(A). However, in a case that involves no factual dispute but rather a clear

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[16] *Accord, Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1574 n.6 (11th Cir. 1983) (*en banc*) (under § 1414(d) "[T]he state agency must administer funds and services *directly* if it determines that the local educational agency is failing to provide appropriate programs."); *Anderson v. Thompson*, 658 F.2d 1205, 1207 n.1 (7th Cir. 1981). *See also Kerr Center Parents Association v. Charles*, 572 F. Supp. 448, 458-59 (D. Ore. 1983).

default by a local education agency in its responsibility to provide a free appropriate public education, § 1415 gives the state both the authority and the obligation to remedy the default.

Finally, even if Petitioner were correct in his position that § 1415 applies only when there is a district-wide breakdown in the provision of services, this is such a case. Respondents in this case have alleged a statewide failure to establish a lawful policy for discipline of disabled students. As a consequence of this failure, the two named plaintiffs and all other behaviorally handicapped students have been denied their right to a free appropriate public education. (*See* Section I, *supra.*) Therefore, even if the scope of § 1414(d) is less broad than respondents herein assert, the court properly applied it to this case.

## CONCLUSION

In conclusion, *amici* urge this Court to reject Petitioner's position and to affirm the decision of the Ninth Circuit. The unilateral transfer of behaviorally disabled students by school officials violates the children's rights under the EHA to free appropriate public education and to the maintenance of their "current educational placements" during the administrative and judicial proceedings required by the Act.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

(10)

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728.

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1986.

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,
PETITIONER,

*v.*

JOHN DOE AND JACK SMITH,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

## Brief for the Center for Law and Education, Inc., Advocates for Children, Disability Law Center, Massachusetts Advocacy Center, San Francisco Lawyers' Committee for Urban Affairs as Amici Curiae Supporting Respondents.

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## Question Presented.

1. Whether the "stay put" provision of the Education for All Handicapped Children Act, Pub. L. 94-142, precludes a local school district from immediately changing the placement of a child whose handicap-related behavior endangers himself or others.

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## Brief for the Center for Law and Education, Inc., Advocates for Children, Disability Law Center, Massachusetts Advocacy Center, San Francisco Lawyers' Committee for Urban Affairs as Amici Curiae Supporting Respondents.

### Statement of Interest of Amici.

The Center for Law and Education, Inc., the national support center on education issues for the legal services program, provides legal assistance to field programs and other attorneys representing indigent clients. For a number of years, approximately 50 percent of all requests for legal support have been in the area of special education, and a large percentage of those requests raise issues

pertaining to the use of exclusionary discipline practices. In this area the Center has published memoranda and articles and submitted comments to proposed federal regulations.

Advocates for Children of New York, Inc. ("AFC") is a seventeen year old volunteer, non-profit child rights organization. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in individual and class actions, presentation of testimony in public hearings and other advocacy activities. AFC provides assistance to suspended students, including those with disabilities.

Disability Law Center, Inc. ("DLC") is a private, non-profit organization established and funded pursuant to 42 U.S.C. §§ 6000 *et seq.*, to protect and advocate for the rights and interests of developmentally disabled persons in Massachusetts. DLC has represented numerous parents and children in cases involving application of state and federal special education statutes in administrative and judicial proceedings.

Massachusetts Advocacy Center ("MAC") is an eighteen year old private, non-profit organization exclusively concerned about children throughout the state who may be excluded from school or from services to which they are entitled. Over the years, MAC has represented innumerable parents of handicapped pupils in administrative appeals and in state and federal actions brought under the state and federal special education laws.

San Francisco Lawyers' Committee for Urban Affairs is a civil rights and legal services organization devoted to advancing the rights of people of color, low income individuals and groups, immigrants and refugees, and others who are under-represented. It has a long history of involvement in cases seeking equal education opportunity for all children and has participated in numerous public education cases including cases involving school discipline and the rights of educationally handicapped children.

Amici believe that legitimate interests of excellence in education and school safety can be satisfactorily achieved without a deprivation or substantial dilution of the rights to a free, appropriate public education as guaranteed by the Education of the Handicapped Act ("EHA"). Based upon their experience in school-related matters, amici wish to provide this Court with a unique analysis of the legal issues and the implications of a decision in this matter.



**Consent to Filing.**

Both parties consent to the filing of this brief as evidenced by documents filed with the clerk.

**Statement of Facts.**

The amici adopt respondents' statement of facts.

**Summary of Argument.**

Through this brief, amici seek to lay out the proper statutory framework for analyzing the question before this Court.

The legislative history and language of the Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.*, show that one of its central purposes was to protect handicapped pupils from exclusion. Congress created certain entitlements and procedural safeguards to insure that all handicapped children, including those with emotional and behavioral control difficulties, would receive a full, free, and appropriate education. Section 1415(e) (3), at issue in this case, and certain other statutory provisions limit school authorities' use of expulsions and long-term suspensions as disciplinary measures for handicapped pupils. Yet, school officials' legitimate interest in maintaining discipline can be accommodated within the parameters of the EHA. Amici suggest that the proper analysis of this tension between the state interest in discipline and the federal entitlements was set forth in the seminal case, *Stuart* v. *Nappi*, 443 F.Supp. 1235 (D. Conn. 1978). Therein, it is demonstrated that the EHA permits both short-term and long-term methods for addressing problems posed by dangerous or substantially disruptive handicapped pupils (pp. 15-23).

Amici agree with the outcome of the Ninth Ciruit's ruling that enjoined school authorities from changing a pupil's educational placement without parental consent during the pendency of EHA

review proceedings. However, amici reject that appellate court's construction of § 1415(e) (3) in that it is based upon four erroneous propositions: (1) that EHA protections apply only to handicapped pupils whose misbehavior is directly related to their handicapping condition; (2) that suspensions for as many as 30 days, so long as they are fixed, temporary, and do not single out handicapped pupils, do not constitute a change in educational placement; and (3) that the "stay-put provision" allows recourse to the gamut of lesser disciplinary measures defined to include 30 day suspensions; and (4) that during the period of expulsion of a handicapped pupil unable to prove the causal nexus between behavior and handicap, the school district has no obligation to provide a comparable educational program (pp. 24-29).

Based on the record, amici do not believe the question presented is properly before the Court.[1]

## Argument.

### I. Congress Responded to the History of Mistreatment of Handicapped Children by Public School Systems, Often by Their Total Exclusion from Education, By Creating Broad Entitlements in the Education of the Handicapped Act.

#### A. *The Legislative History of the EHA Revealed Broad Mistreatment and Exclusion of Handicapped Pupils, Including Those with Behavioral Problems, and the Need for Requiring the Provision of Educational Services for All Handicapped Pupils.*

Congress enacted the Education of the Handicapped Act, 20 U.S.C. §§1400 *et seq.*, in response to evidence of mistreatment, including that "for years handicapped children of this country have been kept in the dark, deprived of a full free public education." 121 Cong. Rec. H. 37027 (daily ed., Nov. 18, 1975) (remarks of Rep. Gude). Passage of the Act was the culmination of Congressional attempts begun in 1966, to address the national failure to provide disabled children "educational opportunity that has been long considered the right of every other American child" [Cong. Rec. S. 20427 (daily ed., Nov. 19, 1975) (remarks by Sen. Randolph)] by progressively increasing federal responsibility for such education.[2]

At regional hearings held in 1973 and 1974, the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard numerous witnesses, including parents, teachers, special education professionals, and other professionals experienced in the education and care of handicapped children, testify that substantial numbers of handicapped children were excluded from school, denied necessary services, and subjected to educational neglect.[3] Parents and educators discussed the widespread failure of states to provide the breadth of supportive services necessary to meet the varied needs of children having handicapping conditions ranging from mild to severe.[4] Services discussed included, but were not limited to, specialized diagnostic evaluations, speech therapy, individualized tutoring, behavior-modification programs, psychological counseling, vocational training, and self-help and self-care skills training programs.[5] It is noteworthy that some of these services

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[1] Amici support respondents' position that certiorari was improvidently granted (see Respondents' Brief) and would also suggest that the issue before the Court is moot as to the plaintiffs-respondents.

[2] Pub. L. No. 89-10, 79 Stat. 27 [codified at 20 U.S.C. §§ 236-244 (1965)]; amended by Pub. L. No. 89-750, § 161, 80 Stat. 1204 [codified at 20 U.S.C. §§ 1201-1213 (1966)]; amended by Pub. L. No. 91-230, §§ 601-662, 84 Stat. 175-88 [codified at 20 U.S.C. §§ 1401-1461 (1970); amended by Pub. L. No. 93-380, §§ 611-621, 88 Stat. 579-585 [codified at 20 U.S.C. §§ 1401-1461 (Supp. 1975)]; amended by Pub. L. No. 94-142, 89 Stat. 773 [codified at 20 U.S.C. §§ 1401-1461 (1976)] (Education for All Handicapped Children Act of 1975). H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-7 (1975) [hereinafter "House Report"]; S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975) reprinted in 1976 U.S. Code Cong. & Ad. News, 1425, 1429-32 [hereinafter "Senate Report"].

[3] Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommitte on the Handicapped of the Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. (1973-74) [hereinafter "Senate Hearings"]; House Report, *supra*, note 2 at 5-6.

[4] Senate Hearings, *supra*, note 3 at 399 (orthopedically disabled); 796 (hard of hearing); 833 (speech impaired and deaf); 805, 807 (learning disabled; 812 (cerebral palsy); 403-11 (mentally retarded); 1213 (emotionally disturbed); 394, 397, 793 (autistic).

[5] Senate Hearings, *supra*, note 3 at 45, 87, 790, 797, 809, 813, 833.

would assist emotionally disturbed students and other handicapped pupils with behavioral problems to benefit from and to participate in their special education programs. Furthermore, testimony revealed that even in states which statutorily recognized handicapped children's right to public education, significant numbers of these children continued to be excluded from school while others were placed in programs without any regard for their individual needs.[6]

Statistics compiled for Congress by the Office of Education estimated that of eight million handicapped children in the United States, nearly two million were excluded from public schools, and more than four million of these children were receiving an inappropriate education.[7] The Office of Education data revealed that children of all ages and with a range of handicapping conditions were affected. For example, pupils excluded or receiving inappropriate education included 82% of hard-of-hearing children; 67% of deaf-blind and other multi-handicapped children; 88% of those classified learning disabled; and 82% of emotionally disturbed children.[8]

Throughout the hearings, legislators specifically referred to the problem of exclusion. Senator Williams, chair of the subcommittee, summarized his observations as follows:

> "*Exclusion from school*, institutionalization, the *lack of appropriate services to provide attention to the individual child's need* — indeed, the *denial of equal rights* by a society which proclaims liberty and justice for all of its people — are echoes which the subcommittee has found throughout all of its hearings. . . ."

Senate Hearings, *supra*, note 3 at 1155-56 (emphasis added).

[6] For example, in Minnesota, Senator Humphrey stated that in 1971-72, while 70,423 handicapped children were served, another 52,242 eligible handicapped children received no services. Senate Hearings, *supra*, note 3 at 1156 (statement of Sen. Humphrey). Also, in Massachusetts, a state with a progressive law in effect, at least 100,000 eligible children were excluded from school. *Id.* at 346 (testimony by David Bartley, Speaker of Massachusetts House of Representatives).

[7] Senate Report, *supra*, note 2 at 8; House Report, *supra*, note 2 at 11-12. Pub. L. No. 94-142, § 3(a), 89 Stat. 774 (1975) (reprinted in notes to 20 U.S.C. § 1401), codified at 20 U.S.C. § 1400(b) (1)-(4).

[8] *Id.*



Senator Mondale made similar observations:

> "For many years handicapped children have been *placed in institutions*, or *segregated in schools and classes*, or *left to sit at home*, where they have not received the educational opportunity which is their right under the law."

Senate Hearings, *supra*, note 3 at 1153 (emphasis added).

Testimony and statements of parents, state officials, and members of Congress evidenced both the need for and the intent of the proposed federal legislation (S.6)[9] to insure equal access to a free appropriate education for all handicapped school-aged children regardless of the nature or severity of their handicapping conditions. For example, a Massachusetts mother of a handicapped adolescent with behavior disorders cited the critical need to serve "all handicapped children," referring specifically to the "most seriously disturbed children [who] have been labeled mentally ill, autistic, schizophrenic, retarded, and even 'something else.'" Testimony of Barbara Cutler, Senate Hearings, *supra*, note 3 at 394-95.

In an observation pertinent to the issues of this case, David Bartley, Speaker of the Massachusetts House of Representatives, testified that "[c]hildren have been denied an education because of their adjudged incorrigibility or maladaptive behavior or because many local communities have long resisted measures to inaugurate publicly supported curriculums for the handicapped as a misguided economic measure." Senate Hearings, *supra*, note 3 at 346. Another widespread problem was flagged by Senator Brooke who noted that although most state constitutions guarantee a right to education, "[m]ost states have legal provisions which authorize school authorities to exclude certain students from public schools." Hence, the Senator observed, states "deny those very children who most need help in being taught." Senate Hearings, *supra*, note 3 at 342.

Congress was aware that the kind of provisions expressly noted by Senator Brooke had in fact been successfully challenged in

[9] United States Senate bill 6 (S.6), a comprehensive handicapped education bill originally introduced in 1973, was ultimately enacted as Pub. L. No. 94-142, the Education for All Handicapped Children Act of 1975.

two prominent federal actions. See *Pennsylvania Association for Retarded Children* ("*PARC*") v. *Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972); *Mills* v. *District of Columbia Board of Education*, 348 F.Supp. 866 (D.D.C. 1972). These cases established the principle that exclusion is unconstitutional. Senate Report, *supra*, note 2 at 6-7.[10] Senator Kennedy referred to the *Mills* decision in commenting on the need to protect handicapped pupils, whatever their handicap, from being improperly excluded from school. He noted that S.6 "will implement the recent decision of U.S. District Court Judge Joseph C. Waddy who declared that the handicapped child and the emotionally disturbed child have the same constitutional right to equal educational services as any other child. . . ." Senate Hearings, *supra*, note 3 at 342. As Kennedy elaborated:

> "This legislation offers [handicapped children] hope, hope that *whatever their handicap*, they will be given the chance to develop their abilities as individuals and to reach out with their peers for their own personal goals and dreams."

Senate Hearings, *supra*, note 3 at 341 (emphasis added). Senator Mondale similarly reiterated that the legislation was intended to incorporate a "zero reject" philosophy:

> "Recent court decisions, however, have made it clearer than ever that we have not only a moral but also a legal obligation to provide the opportunity for *every handicapped citizen* to reach his or her highest educational potential.
>
> An important provision of the bill before us today would require that every State have in effect a policy stating the *right of all handicapped children* to "a free appropriate

[10] See House Report, *supra*, note 2 at 3-4. In the consent agreement in *PARC* v. *Pennsylvania*, *supra*, the court accepted plaintiffs' position based on expert testimony that all retarded children are capable of benefitting from education and training, and therefore, could not be excluded on the basis of handicap. The court in *Mills* v. *D.C. Board of Education*, *supra*, held the exclusion of *all* handicapped children, whether they were labeled retarded, hyperactive, or "behavior problems" to be violative of the equal protection principles embodied in the fifth amendment; and that due process requires that a full and fair hearing precede exclusion from or placement in a special education program. *Id.* at 875.



> public education," and also require that the States develop specific plans for implementing that policy by 1976. The bill would also insure that *each handicapped child be treated as an individual* with unique strengths and weaknesses, and not as a member of a category of children all presumed to have the same needs."

Senate Hearings, *supra*, note 3 at 1153-54 (emphasis added).

This Court recognized in *Board of Education* v. *Rowley*, 458 U.S. 176, 192 (1982), that the impetus for enacting the Education for All Handicapped Children Act of 1975 came from the two federal court decisions. "The fact that both *PARC* and *Mills* are discussed at length in the legislative reports suggests that the principles which they established are the principles, which to a significant extent, guided the drafters of the Act." Indeed, this Court noted that the Senate Report describes the proposed legislation as having "incorporated the major principles of the right to education cases." *Id.* at 194-195, citing Senate Report, *supra*, note 2 at 8; House Report, *supra*, note 2 at 5.

### B. *The EHA Creates Broad Entitlements for Handicapped Pupils and Explicitly Addresses the Problem of Exclusion.*

While Congress' power to enact this grant-in-aid program flows partially from the Spending Clause,[11] the EHA is also an exercise of Fourteenth Amendment powers designed to effectuate the Equal Protection Clause.[12] Moreover, Congress expressly stated in the preamble of the EHA:

> [I]t is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of handicapped children in order *to assure equal protection of the law*.

Pub. L. 94-142, § 3(b) (9), codified at 20 U.S.C. § 1400(b) (9) (emphasis added).

[11] *Board of Education* v. *Rowley*, *supra*, 458 U.S. at 190 n.11, 204 n.26.

[12] *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). Accord *Crawford* v. *Pittman*, 708 F.2d 1028, 1036 (5th Cir. 1983); *David D.* v. *Dartmouth School Committee*, 775 F.2d 411, 421 n.7 (1st Cir. 1985).

Based on the record before it, Congress explicitly conditioned receipt of federal monies under the EHA upon the commitment of each participating state to provide each handicapped child within its jurisdiction a free appropriate public education in accordance with the terms of the Act. 20 U.S.C. §§ 1412(1), 1412(4), 1414(a) (5). Without doubt the EHA embodies the principle established in *PARC*, *supra*, and *Mills*, *supra*, that no handicapped child is too retarded, too disturbed, or too much of a behavior problem to be excluded from or denied his/her right to public education. Congress was clearly aware of children with disabilities ranging from mild to severe[13] and both the complex and foundational nature of their educational needs. The EHA contains an unequivocal directive to state and local educational agencies to provide a full free and appropriate public education for all handicapped children, "regardless of the severity of their handicap." 20 U.S.C. § 1412(2) (C). Furthermore, in response to Congressional findings of exclusion and denial,[14] the Act explicitly directs that priority be given to all children who are not currently receiving an education and those "within each disability with the most severe handicaps who are receiving an inadequate education." 20 U.S.C. § 1412(3).

In requiring that handicapped children be provided an appropriate education, Congress mandated that states and local education agencies provide individualized instruction designed to meet each child's unique needs. 20 U.S.C. §§ 1412(1), 1401(18), (19). The concept of appropriate education is necessarily broad, encompassing services traditionally thought of as educational as well as basic self-help and social skills as dressing, feeding, and communication. See, e.g., *Battle* v. *Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980); *Kruelle* v. *New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981). In addition, the EHA requires

[13] The term "handicapped children" is defined under the EHA [20 U.S.C. § 1401] to include children whose handicapping conditions are characterized in part by behavioral difficulties. See, e.g., "mentally retarded," 34 C.F.R. § 300.5(b)(4), "seriously emotionally disturbed," 34 C.F.R. § 300.5(b)(8) (i) (C). Note the term "seriously emotionally disturbed" does not include children who are merely socially maladjusted. 34 C.F.R. § 300.5(b) (8) (ii).

[14] E.g., 20 U.S.C. § 1400(b) (4) states: "One million of the handicapped children in the United States are excluded from the public school system and will not go through the education process with their peers." See also n.7, *supra*.



provision of such supportive, corrective, and developmental services as are necessary for a handicapped child to benefit from his/her special education program. 20 U.S.C. §§ 1412(1), 1401(17). To accommodate a handicapped child's educational needs, schools are, therefore, required to provide a comprehensive range of services, including but not limited to counseling, psychological services, and "[w]orking with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school." 34 C.F.R. § 300.13(b) (2), (8), (11).[15]

Substantive and procedural rights available to eligible pupils under the EHA [§ 504 of the Rehabilitation Act of 1973][16] were intended to protect them from being constructively excluded from public education as well as being subject to long-term or indefinite suspensions or expulsions. Under the federal statute(s), handicapped students have a right to receive a free appropriate public education, which as described above, includes specifically designed instruction to meet their individual needs. 20 U.S.C. § 1401(16), (18); 34 C.F.R. §§ 300.1, 300.4, 300.13-.14 [also note 34 C.F.R. § 104.33(b)]. Second, handicapped students have the right to have any change in placement occur only through the Act's prescribed procedures. 20 U.S.C. § 1415(b) (1) (C), (D); 34 C.F.R. § 300.504(a), (b) (1) (ii), [also note 34 C.F.R. § 104.36]. Third, the EHA requires each handicapped pupil to be educated with his/her non-handicapped peers to the maximum extent appropriate. 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. §§ 300.132, 300.227, 300.550-.553 [also note 34 C.F.R. § 104.34(a)]. Fourth, § 1415(e)(3) of the Act establishes the right of every handicapped student to continuation of his/her current educational placement during the pendency of any hearing or appeal, or during any proceeding relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education. See also 34 C.F.R. § 300.513. Finally, such a student has the right not to be excluded from, denied

[15] See, e.g., *Abrahamson* v. *Hershman*, 701 F.2d 223 (1st Cir. 1983), *North* v. *District of Columbia Board of Education*, 471 F.Supp. 136 (D.D.C. 1979).

[16] 29 U.S.C. § 794; 34 C.F.R. Part 104. While the scope of respondents' rights under § 504 is not before this Court, it is significant that handicapped pupils have additional broad protections, procedural and substantive, available to them under § 504.

benefits, aids, or services or be discriminated against on the basis of one's handicap [20 U.S.C. § 1400, 29 U.S.C. § 794] be it actual or perceived. 34 C.F.R § 104.4(a), (b).

Moreover, it is significant that this Court recognized in *Board of Education* v. *Rowley, supra,* the importance of strict adherence to the EHA's procedural requirements set forth in 20 U.S.C. § 1415. Compliance with procedures plus parental participation in the development of state plans, policies, and in the formulation of the child's individual education plan were, this Court stated, designed to insure that handicapped children receive all of the benefits to which they are entitled by the Act. *Id.*, 458 U.S. at 205-06, 208-09.

## II. School Authorities' Use of Exclusion as a Discipline Measure Must Operate in a Manner Consistent with the Entitlements Created by the EHA.

### A. *This Court Has Held that Entitlements Created by Federal Law Limit School Authorities' Right to Exclude Pupils for Disciplinary Reasons.*

It is clear that handicapped pupils have certain protections based upon their being "handicapped" under the EHA [and § 504 of the Rehabilitation Act of 1973]. While courts generally consider school disciplinary matters to be within the discretion of state and local authorities, these federal statutes containing explicit entitlements to substantive and procedural rights have implications for disciplining handicapped students.

This Court has previously construed federal law to place both substantive and procedural restraints on state power to discipline students. In *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 505-06 (1969), this Court invalidated, on free expression grounds, the suspension of students who had protested the Viet Nam War by wearing black armbands. The Court also identified the type of conduct which could be prohibited. *Id.* at 512-13. In *Goss* v. *Lopez,* 419 U.S. 565 (1975), this Court held that in view of a student's protected interest in education even suspensions of up to 10 days must generally be preceded



by procedural protections. *Id.* at 582. The Court also addressed emergency circumstances. *Id.* at 582-83.

In summary, the Court implicitly recognized in both *Tinker* and *Goss* that state disciplinary practices, including school exclusion, must take account of federal entitlements.[17] At the same time, the Court accommodated legitimate state interests. The same approach is proper here, particularly because exclusion was one of the problems which Congress explicitly sought to address.

### B. *Court Decisions and Administrative Standards Demonstrate the Proper Accommodation of the Entitlements Created by the EHA and State Interests in Maintaining Discipline.*

Certain provisions of the EHA[18] which create specific substantive and procedural rights for students identified as handicapped are adversely impacted absent strict limitations on school authorities' use of exclusion as a discipline measure.

*Stuart* v. *Nappi,* 443 F.Supp. 1235 (D. Conn. 1978), first addressed the tension between a handicapped pupil's rights under the EHA [and § 504] and the state interest in expelling the pupil. The case involved a handicapped high school pupil, who was suspended for 10 days and faced an expulsion hearing following her participation in a school-wide disturbance. Kathy Stuart's school records described a student with serious academic and emotional difficulties whose deficient academic skills were caused by a complex of learning difficulties and limited intelligence. Her record further reflected a long history of behavioral difficulties. Judge Daly commented that "[i]t was precisely for handicapped children such as plaintiff that Congress enacted the Education of the Handicapped Act." *Id.* at 1237.

Plaintiff, who was suspended through regular disciplinary procedures (*id.* at 1239), sought to enjoin a scheduled expulsion hearing on the basis that she had been denied her rights under the EHA. The court was fully cognizant that plaintiff, a handicapped student under the Act, was entitled to a special education

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[17] See also *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943). *Wisconsin* v. *Yoder,* 406 U.S. 205, 213-14 (1972).

[18] [and § 504 of the Rehabilitation Act]

program responsive to her needs and to the full procedural safeguards contained in the EHA. *Id.* at 1238. Reviewing the pupil's educational history, the court found that plaintiff had first been referred for evaluation in 1975, because she was "academically unable to achieve success," diagnosed as having a major learning disability, and scheduled on a trial basis in the special education program pending completion of a psychological evaluation "at the earliest possible time." *Id.* at 1238. Ten months later the psychologist concurred in the diagnosis of plaintiff as severely learning disabled and reported: "I can only imagine that someone with such deficit and lack of development must feel utterly lost and humiliated at this point in adolescence in a public school where other students . . . are performing in such contrast to her." *Id.* at 1238. This report was reviewed by the child placement team in March 1976. Two months later indications of behavioral/emotional difficulties surfaced when plaintiff's special education teacher reported that she had stopped attending the program. Although the teacher also requested that the placement team consider whether plaintiff's primary handicap was emotional, no responsive action was taken. *Id.* at 1238. In March 1977, the team reviewing plaintiff's IEP prescribed a new special education program for her in 1977-78. In September, despite school authorities being on notice that the program was not being administered to Kathy, no action was taken to remedy the situation. On September 14, 1977, plaintiff participated in the school-wide disturbances resulting in her suspension and recommendation for expulsion. *Id.* at 1238-39.

The federal court ruled that plaintiff was entitled to a preliminary injunction enjoining the school district from conducting the hearing to expel her. The court found that the plaintiff had demonstrated irreparable injury[19] and probable success on the merits of four federal claims arising under the EHA. These claims based on statutory entitlements under the EHA, are discussed briefly below in the context of *Stuart*, other relevant cases, and administrative policies.

[19] If expelled, plaintiff would have been denied an educational program until another review was held and a new program developed. *Id.* at 1240. Also her expulsion would preclude her from participating in any special programs at the high school, limiting her education options to a private school, if available, or homebound tutoring. *Id.* at 1240.



### 1. The Right to a Free Appropriate Public Education.

First, although the school district was required to provide plaintiff with a free appropriate public educational program specially tailored to meet her unique needs [see 20 U.S.C. § 1401(1), (15)-(19), § 1412],[20] the record before the *Stuart* court clearly suggested that the school failed to provide her with such a program. *Id.*, 443 F.Supp. at 1241. Where the high school neglected to act when it learned that plaintiff had stopped participating in the special education program, the court acknowledged that the school's "handling of the plaintiff may have contributed to her disruptive behavior." If, the court stated, a subsequent placement team found that "plaintiff had not been given an appropriate special education placement, defendant's resort to its disciplinary process is unjustifiable." *Id.* at 1241.

The court found that any non-emergency exclusion, regardless of whether it was for behavior related to the handicapping condition, would deprive a handicapped pupil of an "appropriate education." An exclusion or limited suspension should be permitted under the EHA only in an emergency situation involving issues of health, safety, or substantial disruption.[21] *Id.* at 1242-43.

### 2. The Right to Have Any "Changes in Educational Placement" Occur Through Prescribed Procedures.

The court's ruling in *Stuart* was the first to address whether an explusion[22] constituted a change in educational placement under

[20] Courts have also construed § 504 to provide a private cause of action for the enforcement of the right of handicapped children to a free appropriate education. See, e.g., *S-1* v. *Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980), affirmed in part, vacated on other grounds *sub nom. Irving Independent School District* v. *Texas*, 468 U.S. 883 (1984).

[21] As this Court recognized in *Goss, supra*, 419 U.S. at 582-83, to constitute an emergency which would warrant the denial of procedural rights prior to a pupil's removal from school, the pupil's presence must pose a *continuing danger* to persons or property or an *ongoing threat* of conduct which will *actually and substantially interfere* with the ability of other students to learn. See *Lamont X.* v. *Quisenberry*, 606 F.Supp. 809, 816 (S.D. Ohio 1984) (finding defendants, who responded to an arguably "emergency" situation necessitating removal of two severely behaviorally handicapped pupils, by imposing long-term change in placement instead of short-term suspension, did not respond by means of "normal procedures"; neither did "a sufficient emergency *persist* to justify exclusion of plaintiffs. . . .").

[22] Conn. Gen. Stat. § 10-233(d) defines expulsion as "an exclusion from school privileges for more than ten consecutive days . . . ."

the EHA. Ruling in the affirmative, the court held that expulsion has the effect of changing the plaintiff's placement in a manner inconsistent with the procedures prescribed by the EHA.[23] *Id.* at 1241, 1242-43.

The *Stuart* court noted that the EHA prescribes a procedure for transferring disruptive students to more restrictive placements when their behavior significantly impairs the education of other children. *Id.* at 1243, citing 34 C.F.R. § 330.552. Any change in a handicapped student's placement must be made by a professional team with parental participation, after consideration of the range of available placements and the student's particular needs. *Id.* at 1243,[24] citing 34 C.F.R. § 330.533(a) (3), § 330.345. Thus, "the use of expulsion proceedings as a means of changing the placement of a disruptive handicapped child contravenes the procedures of the Handicapped Act." *Id.* at 1243.

Exclusion beyond 10 days,[25] regardless of the reason, the court ruled, is sufficiently lengthy to amount to a change in the student's current placement, and can, therefore, be accomplished only through the proper procedures. *Stuart, supra* at 1241-42. Case law developments after *Stuart*, support the position that a "change of educational placement" in the context of the EHA is a modifi-

[23] Procedural safeguards to be accorded parents of handicapped pupils under the EHA include the right to be notified in writing within a reasonable time before a school district proposes to change the educational placement of the child or provision of free appropriate public education. 20 U.S.C. § 1415(b) (1) (C); 34 C.F.R. § 330.504(a). The notice must advise parents of all procedural safeguards available to them and describe the proposed action, the reasons therefor, other options considered and the reasons for their rejection. 34 C.F.R. § 300.505. The responsibility for changing a handicapped child's placement rests with a group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.533(a) (3). All the placement decisions must also be made consistent with the child's individualized education program and the child's right to be educated in the "least restrictive environment." 34 C.F.R. § 300.533. Also, the parent, after receiving notice of the proposed change in educational placement or provision of free appropriate education, has a right to complain under 20 U.S.C. § 1415(b) (1) (E) and to an impartial due process hearing with respect to said complaint. 29 U.S.C. § 1415(b) (2), (c); 34 C.F.R. § 300.506(a).

[24] See *S-1* v. *Turlington, supra,* 635 F.2d at 347 (placement decisions under EHA must be made by group knowledgeable about child, meaning of evaluation, and available options).

[25] See discussion of policy positions re/10 day period issued by U.S. Department of Education's Office for Civil Rights and Office for Special Education Programs, *infra* at 17-18.



cation that affects the handicapped child's learning experience is some significant way. *Brookline School Committee* v. *Golden,* 628 F.Supp. 113, 116 (D. Mass. 1986).[26]

It is noteworthy that within the United States Department of Education both the Office for Special Education Programs (OSEP), responsible for monitoring and enforcement of the EHA, and the Office for Civil Rights (OCR), responsible for enforcing § 504 and its implementing regulations, have determined that an exclusion from school of more than 10 schools days' duration constitutes a change in placement.[27] Under both laws a change in placement triggers procedural safeguards.[28]

OSEP's position[29] is that "a suspension or expulsion of more than ten days' duration constitutes a change in placement which would trigger the procedures and protections of Part B of the Education of the Handicapped Act (EHA-B)." This protective limitation applies to all handicapped pupils under the EHA irrespective of whether or not a direct nexus exists between the misconduct and the pupil's diagnosed handicapping condition. To date, however, OSEP has "not developed a position on when a

[26] Citing *Concerned Parents & Citizens* v. *New York City Board of Education,* 629 F.2d 751 (2d Cir. 1980), *cert. denied,* 449 U.S. 1078 (1981) (school closing not a change in educational placement where children are transferred to similar programs in other schools); *Lamont X.* v. *Quisenberry,* 606 F.Supp. 809 (S.D. Ohio, 1984) (removal of pupil from classroom to provide home-bound tutoring is a change in educational placement); *Stock* v. *Massachusetts Hospital School,* 392 Mass. 205, 467 N.E.2d 448 (1984) (the decision to graduate a child, thus terminating his eligibility for special educational services, is a change in educational placement); *S-1* v. *Turlington,* 635 F.2d 342 (5th Cir. 1981) (transfer of child from classroom to home-based tutoring is a change in educational placement). See also *Sherry* v. *New York State Education Dept.,* 479 F.Supp. 1328 (W.D.N.Y. 1979) (indefinite suspension of a legally blind and deaf student who suffered from brain damage and emotional disorder which made her self-abusive constituted a change in education placement within the meaning of § 1415); *Doe* v. *Koger,* 480 F.Supp. 225 (N.D.Ind. 1979) (indefinite suspension pending formal expulsion is a change in placement in violation of EHA).

[27] This Court has recognized that agency regulations and interpretation of statutes and regulations are due great weight. *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965); *Griggs* v. *Duke Power Company,* 401 U.S. 424, 433-34 (1971); *Alexander* v. *Choate,* 469 U.S. 287, 105 S.Ct. 712, 722-23 n.24 (1985).

[28] See note 23, *supra;* also 34 C.F.R. § 104.35, 104.36.

[29] Letter to Martha J. Fields, Assistant State Superintendent, Maryland State Dept. of Education, Baltimore, MD 21202-2595; February 26, 1987; from: G. Thomas Bellamy, Director, OSEP, 2 Education for the Handicapped Law Reporter (EHLR) 211:437.

series of shorter suspensions would cumulate to constitute a change in placement." States and local school districts were encouraged "to be alert to the possibility that repeated disciplinary problems may indicate that the services being provided . . . should be reviewed or changed . . . ." *Id.*

OCR's policy[30] prohibits long term suspension (10 days or more or a series of suspensions totaling 10 days or more during a school year) or expulsion of handicapped students when the behavior for which suspension and expulsion is being considered is an element of or related to the student's handicap or the result of an inappropriate educational placement. School districts may respond to seriously disruptive or dangerous behavior of handicapped pupils through emergency removal or short-term suspensions. However, the exclusion of a handicapped student from his/her education program for more than a total of 10 days during a school year constitutes a change in educational placement subject to the evaluation and placement requirements [34 C.F.R. § 104.35] and due process requirements of the § 504 regulations. 34 C.F.R. § 104.36. During the evaluation and placement period, necessitated by the change in educational placement, the student must continue to receive educational services. Any disagreements as to whether the disruptive or dangerous behavior is an element of or related to a student's handicap or the result of an inappropriate educational placement must be resolved in an impartial due process hearing prior to making any change in the pupil's educational placement.

### 3. The Right To Be Educated in the "Least Restrictive Environment."

In *Stuart* v. *Nappi, supra* at 1240, 1242-43, the federal court relied, in part, upon the "least restrictive environment" require-

[30] See (1) letter of finding to: Dr. David Moberly, Superintendent, Seattle School District No. 1, Seattle, WA 98109; Re: Complaint No. 107800030; October 16, 1980; from: Gary D. Jackson, Acting Regional Director, OCR, Region X. 3 EHLR 257:203-04; (2) inquiry by Jane Rhys, Education Program Specialist, Kansas State Dept. of Education, Topeka, KS 66612; Response of April 15, 1985; from Jesse L. High, Regional Director, OCR, Region VII. 3 EHLR 254:26-28.



ment[31] to enjoin the expulsion of a handicapped pupil. The court recognized that if plaintiff were expelled, her education would be restricted to a private placement, if available, or reduced to home-bound tutoring, which "can only serve to hinder plaintiff's social development and perpetuate the vicious cycle in which she is caught." *Id.* at 1240. See also *S-1* v. *Turlington, supra,* 635 F.2d at 348.

The court ruled that the right to an education in the "least restrictive environment" is implemented, in part, by requiring schools to provide a continuum of alternative education placements,[32] through which each child receives an education appropriate to his/her individual needs while maximizing interaction with non-handicapped peers. Therefore, the court determined that expulsion would deny plaintiff her right to interact with her peers in an education program in the least restrictive environment. Further recognizing that "[a]n expulsion has the effect . . . of restricting the availability of alternative placements," and "may well exclude [plaintiff] from a placement that is appropriate for her academic and social development," the court found that "[t]his result flies in the face of the explicit mandate of the [EHA] which requires *that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment.*" *Stuart* at 1242-43 (emphasis added).

The court explicitly found that the EHA prescribes a procedure whereby disruptive children are transferred to more restrictive placements when their behavior significantly impairs the education of other children. The court cited the comment to 34 C.F.R.

[31] The EHA [and § 504] guarantees handicapped students the right to participate in regular classroom and extra-curricular activities with non-handicappd students to the maximum extent practicable while receiving an appropriate education. 20 U.S.C. §§ 1412(5) (B), 1414(a) (1) (C) (iv); 34 C.F.R. §§ 300.132, 300.227, 300.550-.553, [34 C.F.R. § 104.34, 104.4(b) (1) (iv) (3)]. The EHA requires state and local education agencies to insure that "special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5) (B).

[32] The continuum required must include instruction in regular classes, special schools, home instruction, and instruction in hospitals and institutions and provide for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. § 300.551(b).

§ 300.552 concerning least restrictive placements which quotes from the analysis of the § 504 regulations, 34 C.F.R. Part 104-Appendix A., subpart D, para. 24 [34 C.F.R. § 104.34] as follows:

> [I]t should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs. . . .

### 4. The Right to Continue in One's Current Educational Placement.

Section 20 U.S.C. § 1415(e) (3) of the Handicapped Act states:

> During the pendency of any proceedings conducted pursuant to this section,[33] unless the state or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

A complaint filed under 20 U.S.C. § 1415(b) (1) (E), whether challenging the suspension of a handicapped pupil, or his/her

[33] Section 1415 includes proceedings concerning any proposal to initiate or change or refusal to initiate or change the identification, evaluation, or placement of the child or the provision of a free appropriate public education. 20 U.S.C. § 1415(b) (1). It provides that a parent is entitled to complain "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. § 1415(b) (1) (E); that the parent has a right to an impartial due process hearing concerning any complaint or, alternately, concerning any proposal to initiate or change or refusal to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate education. 20 U.S.C. § 1415(b) (2). Other provisions concern the right of an aggrieved party to appeal to the state educational agency, 20 U.S.C. § 1415(c); and the right to bring a civil action in any state court of competent jurisdiction or in a federal district court. 20 U.S.C. § 1415(e) (2).



identification, evaluation, educational program or placement, entitles the parent of said pupil to a due process hearing. 20 U.S.C. § 1415(b) (2); 34 C.F.R. § 300.506(a). And during the pendency of the complaint proceedings, the child is entitled to continue in his/her current educational placement. 20 U.S.C. § 1415(e) (3).

The court in *Stuart, supra,* found that plaintiff was protected by subsection 1415(e) (3), having filed a complaint pursuant to 20 U.S.C. § 1415(b) (1) (E), requesting a hearing and a review of her special education placement. *Id.* at 1241. Because plaintiff did not agree to leave her present special education placement voluntarily, the court noted that the high school's disciplinary process directly conflicted with her right to remain in her present [or last lawful][34] placement under 20 U.S.C. § 1415(e) (3).

The *Stuart* court looked for guidance in resolving this conflict to Department of Health, Education and Welfare regulations implementing the EHA. See 42 Fed. Reg. 42,473 (1977). Contained therein, the court found a comment explicitly addressing this conflict. First, the comment reiterates the rule that after a complaint proceeding has been initiated, a change in a child's placement is prohibited. However, the comment states: "While the placement may not be changed this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others." 42 Fed. Reg. 42,473, 42,496 (1977), codified at 34 C.F.R. § 300.513.

Thus, the court interpreted subsection 1415(e) (3) to prohibit disciplinary measures which have the effect of changing a pupil's placement, while permitting the type of emergency procedures necessary for dealing with a student who is dangerous to himself or others. Support for this interpretation was found in a "comment-to-the-comment"[35] which clarifies that the comment was added to make it clear that schools are permitted to use their

[34] See *Lamont X* v. *Quisenberry, supra,* 606 F.Supp. at 815.

[35] The complete text of the comment-to-the-comment states: "Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commentor requested that the regulations indicate that suspension not be considered a change in placement. Another commentor wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or if the parents agree, in an interim special placement.

regular procedures for dealing with emergencies. *Id.* at 1242. See also n.21, *supra*. Concurring with the federal agency's reading of its own regulation, the *Stuart* court expressly found "no indication in either the regulations or the comments thereto that schools should be permitted to expel a handicapped child while a special education complaint is pending." *Id.* at 1242.

### C. *Alternatives Are Available to Authorities to Deal with Disruptive Handicapped Pupils in Inappropriate Placements.*

The *Stuart* court properly recognized that "[h]andicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program." *Id.* at 1243. However, as discussed above, the *Stuart* court also recognized that the EHA establishes the procedures which replace expulsion as a means of removing handicapped pupils from school if they become disruptive. The comment to 34 C.F.R § 300.552 makes clear that a handicapped child's placement is inappropriate whenever the child becomes so disruptive that the "education of other students is significantly impaired." In such instances, the court indicated, the EHA affords school authorities both short-term and long-term methods of dealing with disruptive handicapped children who are by definition in inappropriate placements. *Id.*

First, as both the *Stuart* court and the federal agencies responsible for enforcing the EHA and § 504 permit, school authorities faced with an emergency can take swift disciplinary measures, such as a brief suspension, to remove a disruptive or dangerous handicapped pupil from his/her current educational placement. Provided that the suspension is not in excess of 10 school days cumulatively[36] or consecutively,[37] the suspension will not rise to

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Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies." 42 Fed. Reg. 42,473, 42,512 (1977) (to follow codification at 45 C.F.R. § 121a.513) (subsequently codified at 34 C.F.R. § 300.513).

[36] See OCR policy discussed, *supra* at 17-18.

[37] See OSEP policy discussed, *supra* at 17-18.



a "change in placement," which can only be made by knowledgeable persons after considering the range of available placements and plaintiff's particular needs and in accordance with procedural safeguards set forth in the Act.[38] When a long-term method for addressing the needs of a handicapped pupil with behavioral problems is required, school authorities can initiate change in educational placement procedures by convening the evaluation/placement team. While the EHA prescribes a procedure for transferring disruptive or dangerous handicapped children to more restrictive placements [34 C.F.R. § 300.552], the responsibility for substantial modifications of a child's educational program lies with the evaluation/placement team, acting in compliance with the change in placement procedures. *Stuart, supra* at 1243; see also n.23, *supra*.

Use of these short-term (emergency)[39] and long-term measures for dealing with handicapped pupils having serious behavioral problems is consistent with the legal parameters and the spirit of the EHA. This Court recognized in *School Committee of Burlington* v. *Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 2004-05 (1985), that different policy considerations come into play when a local education agency proposes to take unilateral action to change a pupil's placement, and that in such situations §1415(e) (3) operates much like a rebuttable presumption requiring maintenance of the original placement. This approach acknowledges the explicit wording of the statute — "the child *shall* remain" (emphasis added) yet, preserves to courts enforcing the EHA their "traditional powers of equity" in fashioning appropriate remedies. *Id.* at 2005. Thus, even as the Court of Appeals recognized below, *Doe* v. *Maher*, 793 F.2d 1470, 1488 (9th Cir. 1986), when no acceptable alternatives exist, a "motion for preliminary injunction should be made by the party wishing to depart from the status quo." This leaves the authority to overrule the "stay-put" provision with the courts, as is proper, not with educational authorities. See *Doe* v. *Brookline School Committee*, 722 F.2d 910, 918 (1st Cir. 1983).

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[38] See n.23, *supra*.

[39] See n.21, *supra*.

Also, in enacting a statute explicitly designed to include even the most severely disabled children in the public school system, Congress intended educators to meet the challenge posed by pupils whose individual needs include lack of appropriate behavioral and emotional controls. For these children, who may be seriously emotionally disturbed or have severe behavioral problems, an appropriate education might consist of specialized instruction and related services including professional assistance in handling their emotional difficulties. *T.G.* v. *Board of Education of Piscataway, N.J.*, 576 F.Supp. 420 (D.N.J. 1983), *aff'd*, 738 F.2d 420 (3d Cir. 1984), *cert. denied.*, 869 U.S. 1086, 105 S.Ct. 592 (1984); *Papacoda* v. *Connecticut*, 528 F.Supp. 68 (D. Conn. 1981).

## III. The Ninth Circuit Court of Appeals' Decision Authorizes Exclusions of Handicapped Pupils Inconsistent with the EHA and Its Legislative History.

Faced with the issue of defining the constraints imposed by the EHA on state disciplinary authority, the Court of Appeals for the Ninth Circuit in *Doe* v. *Maher*, 793 F.2d 1470 (9th Cir. 1986), started with four propositions. First, EHA protections are limited to situations where the conduct for which the student is subject to discipline is a manifestation of the pupil's handicap. *Id.* at 1481. Second, while a "change in educational placement" may only be effected through the EHA's prescribed procedures, a suspension for as many as 20 and even 30 school days is not so substantial a deprivation as to constitute a "change in placement" or a loss of a "free appropriate public education" within the meaning of the EHA. *Id.* at 1484-85. Third, subsection 1415(e) (3) allows "recourse to the gamut of lesser disciplinary measures and program variations that do not rise to the level of changes in placement" (e.g., suspension of up to 20 or 30 days) and to judicial relief should existing procedures prove inadequate. *Id.* at 1486. Further, during the period of expulsion of a handicapped pupil whose misbehavior was not a manifestation of his/her handicap, the school district may cease providing all educational services. *Id.* at 1482.



These propositions involve a serious misreading of the EHA, and one which facilitates exclusions of the type which Congress specifically intended to eliminate and prevent. Obviously, punishing a student for conduct which relates to the pathology, psychology or other reasons for which the student has been identified as handicapped or referred for evaluation violates the student's right not to to be punished in the absence of personal guilt,[40] § 504 of the Rehabilitation Act[41] and the intent of the EHA. However, nothing in the EHA conditions its broad entitlements upon a standard that forces school districts into a difficult and highly problematic causal inquiry into the relationship between handicap and behavior,[42] particularly at a time when emergency action may be needed. Moreover, if one accepts the position that any non-emergency suspension/expulsion constitutes a denial of a handicapped pupil's right to a free appropriate education in the least restrictive environment (e.g., *Stuart* v. *Nappi*, 443 F.Supp. at 1243), there is no rationale for utilizing a behavior-related-to-handicap-standard.

In effect, the Ninth Circuit ignores the fact that the approach of the EHA is to address the behavior problems of handicapped students rather than permit them to be exacerbated through inattention. (See pp. 10-11, 24, *supra*.) An appropriate education can only be provided through a curriculum and placement responsive to the needs of each individual's handicapping condition. One

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[40] *St. Ann* v. *Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) ("punishment must be founded upon an individual's act or omission, not from his status, political affiliation or domestic relationship"); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (illegitimacy); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966) (indigency); *Plyler* v. *Doe*, 457 U.S. 202 (1982) (parents' conduct or alien status).

[41] 29 U.S.C. § 794, 34 C.F.R. § 104.3(j); also see 34 C.F.R. § 104.4(b) (i).

[42] Compare *School Board of the County of Prince William* v. *Malone*, 762 F.2d 1210 (4th Cir. 1985) (upholding nexus between misconduct of acting as conduit in three drug transactions in which plaintiff had taken no drugs nor profited financially and his learning disability which prevented his comprehending or giving long-term consideration to the consequences of his actions) and *Doe* v. *Maher*, *supra*, 793 F.2d at 1480 n.8 (distinguishing "conduct that bears only an attenuated relationship to the child's handicap," i.e, where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves to gain attention, or win the approval of his peers — from conduct that is "caused by" the handicap which "significantly impairs the child's behavioral control.")

essential part of developing an appropriate educational program is anticipating the behavioral manifestations of any handicapping condition. First, certain handicapped children are less able to control behavior than other students. Second, behavior problems of a handicapped student may be directly related to a failure to implement a pupil's IEP or to an inappropriate educational placement.[43] This inappropriate placement may result in serious adjustment problems manifested by disruptive or dangerous behavior. See, e.g., *Stuart* v. *Nappi, supra,* 443 F.Supp. at 1241 ("If . . . plaintiff has not been given an appropriate special education placement, then the defendant's resort to its disciplinary process in unjustifiable."); also *Howard S.* v. *Friendswood Independent School District,* 454 F.Supp. 634, 640 (S.D. Tex. 1978) ("The fact that [plaintiff] was not afforded free, appropriate education during the period from the time he enrolled in high school . . . was . . . a contributing and proximate cause of his emotional difficulties and emotional disturbances.").

Congress provided that each state and local educational agency must have a plan which insures that each handicapped child is evaluated. 20 U.S.C. §§ 1412(2) (C), 1414(a) (1) (A); 34 C.F.R. §§ 300.128, 300.220; 34 C.F.R. § 104.32. Evaluations must be comprehensive, assessing "all areas related to the suspected disability, including . . . social and emotional status." 34 C.F.R. § 300.532(f); 34 C.F.R. § 104.35(b). Also, the education program for each child must include any related services necessary for the child to be able to benefit from special education. 20 U.S.C. § 1414(a) (1) (A); 34 C.F.R. § 104.33. Necessary related services include counseling services, 20 U.S.C. § 1401(17), which federal regulations define as "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel." 34 C.F.R. § 300.13(b) (2). Related services include, therefore, services designed to help handicapped students with behavioral problems. Requiring an individualized education program to address a child's emotional/behavioral needs as well

[43] Note 20 U.S.C. § 1415(e) (3), the "stay-put" provision contains one very significant legislatively created exception, "*unless the state or local education agency and the parents . . . otherwise agree,* the child shall remain in the then current educational placement of such child . . ."; see also *School Committee of Burlington* v. *Dept. of Education, supra,* 105 S.Ct. at 2004.



as his/her learning difficulties, clearly manifests the Congressional scheme to eliminate the exclusion of handicapped pupils with behavioral problems.

The Court of Appeals, in dicta upholding long-term suspensions for as many as 20 or 30 consecutive school days during a school year, relied on the rationale that the discipline procedure[44] does not single out handicapped pupils, the suspension period is fixed and temporary, and school officials are provided some needed breathing space for developing strategies to cope with the child during the pendency of any ensuing review proceedings. *Doe* v. *Maher, supra* at 1484-85.

From a legal and public policy perspective, the appellate court's ruling that a suspension of up to 20 and even 30 school days is not so substantial a deprivation as to constitute a change in educational placement or denial of free appropriate public education is unconscionable. This Court has recognized that for any student education is so important that exclusion for even a day is not *de minimis*. *Goss* v. *Lopez, supra,* 419 U.S. at 576.[45]

In addition, as discussed previously, the federal agencies responsible for implementing the EHA and § 504 have taken the position that an exclusion, via suspension or expulsion, of more than 10 days' duration constitutes a change in placement, *supra*, triggering the procedural safeguards under the EHA. It was by imposing standards governing changes in educational placement, recognized by the appellate court in *Doe* v. *Maher, supra,* 793 F.2d at 1482, that Congress sought to insure that handicapped pupils, including those with serious emotional/behavioral difficulties, could not be arbitrarily excluded and their right to continued appropriate education not interrupted. The very reason for the evaluation/placement team to reconvene following a school district's proposal to change a pupil's placement is to protect the student's interest in his/her right to continued education. This group of persons with special knowledge [34 C.F.R.

[44] Cal. Educ. Code §§ 48912, 48903 (Deering Supp. 1986).

[45] See generally *Campbell* v. *Board of Education of New Milford,* 475 A.2d 289, 290 (Conn. 1984) (upholding rules under which a) a student absent from a year long course, without waiver, for 24 or more days receives no credit and b) a student is subject to a reduction in course grade of five points for each unexcused absence after the first; rules based upon loss of educational content when absent).

§ 300.533(a)] is to ascertain if the current IEP is being fully implemented; if a change in placement will substantially interfere with or, indeed improve attainment of the objectives contained in the IEP; if the pupil's special needs outweigh any potential benefit derived from a change in placement; and if other less exclusionary options have been considered and tried.

Congress intended to protect handicapped pupils' rights to continued appropriate education because the members recognized the importance of education, particularly to a population which has been subjected to mistreatment and abuse, primarily through exclusion from school. Congress clearly did not intend subsection 1415(e) (3) to be interpreted to permit school officials to exclude "unprotected" handicapped pupils for the "temporary" but "fixed" period of 20 or 30 consecutive days authorized by California law (see n.44, *supra*) by characterizing such period as "falling short" of a change in placement. *Doe* v. *Maher*, *supra* at 1486.

This Court discussed at some length subsection 1415(e) (3) in *School Committee of Burlington* v. *Department of Education*, *supra*. Therein, it was acknowledged that at least one purpose of § 1415(e) (3) was to prevent school officials from removing a child from the regular public school over the objections of the parents pending completion of the review proceedings. Explicitly citing *PARC*, *supra*, and *Mills*, *supra*, this Court further recognized that Congress in enacting the EHA "was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *Id.*, 105 S. Ct. at 2005, citing 20 U.S.C. § 1400(b) (4); 34 C.F.R. § 300.347(a).

This Court ruled in *Burlington* that a parent's ignoring § 1415(e) (3) does not constitute a waiver of reimbursement. *Id.* at 2004. Not only does the subsection make no mention of financial responsibility, waiver, or right to reimbursement, but the *Burlington* Court emphasized, if it were interpreted to cut off parental rights to reimbursement, the principal purpose of the Act — to provide free *and* appropriate education — would be defeated. *Id.* Similarly, here, the purpose of the so-called "stay-put" requirement of § 1415(e) (3), i.e., to prevent the unnecessary disruption of education services for handicapped children during the resolution of disputes, will be thwarted if (1) only pupils, whose conduct is



directly related to their handicapping conditions, are protected; (2) if exclusions of up to 30 school days are not considered substantial modifications so as to constitute a change in placement; and (3) if school district's obligation to provide continued appropriate educational services ceases during the period of exclusion.

*The Factual Record in this Case Does Not Warrant Creation of a Huge Loophole by this Court.*

Contrary to the "parade of horribles" alluded to in the briefs of the petitioner and their amici,[46] the record in this case fails to demonstrate that indeed, either of the two named plaintiffs posed a continuing danger to person or property or ongoing threat of substantial disruption upon their return to their respective school placements pursuant to the trial court's order under § 1415(e) (3). Even assuming for purposes of this case that the school officials' actions were warranted in initially removing these pupils from their educational placements following their disruptive behavior, the record contains no evidence that the emergency persisted, i.e., that either boy's behavior posed a continuing danger to himself or others or an ongoing threat of conduct actually and substantially disruptive of the education program during their extended periods of exclusion from school prior to the trial court's issuing an injunction. *Doe* v. *Maher*, *supra*, 793 F.2d at 1477.

Where Congress through the EHA attempted to address a pattern of exclusion, which explicitly included handicapped pupils with behavioral and emotional problems, this Court ought not to create an additional judge-made exception to § 1415(e) (3) based on speculation and fear or apprehension of disruption.[47] Where § 1415(e) (3) contains the statutory exception of parental consent and has been construed to permit judicial relief on a case by case basis, the exception sought by petitioner is unnecessary and will create such a major loophole in the EHA as to defeat its purpose

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[46] Petitioner's Brief at 5 n.5, 6-7; Amicus Curiae Brief of the United States at 23-25.

[47] See *Arline* v. *School Board of Nassau County*, ___ U.S. ___, 107 S.Ct. 1123, 1127-30 (1987).

and intent, i.e., providing a free and appropriate public education to all handicapped pupils.[48] Instead of changing the placement of a handicapped pupil found to be dangerous or substantially disruptive over a sufficiently lengthy period of time through the Act's prescribed procedures, petitioner would remove such pupil from his/her educational placement until all due process and judicial reviews were completed. It is noteworthy that administrative complaints on behalf of the respondents were initially filed in the fall of 1980 — almost seven years ago.

**Conclusion.**

For the reasons discussed above, amici urge this Court to affirm the Court of Appeals' ruling that enjoined school authorities from changing the current educational placement of handicapped pupils without parental consent during the pendency of the EHA review proceedings. Amici further urge that this Court expressly disapprove of the appellate court's interpretation of the EHA as described, *supra* at 24-29.

Respectfully submitted,

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[48] Petitioner's interpretation of § 1415(e) (3) would, if accepted, contravene the explicit mandate of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibiting discrimination on the basis of handicap.

# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
FILED
JUN 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-728

# In the Supreme Court of the United States

October Term, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

*Petitioner,*

*v.*

JOHN DOE and JACK SMITH,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, PROTECTION AND ADVOCACY, INC., AND MENTAL HEALTH ADVOCACY SERVICES, INC., SUPPORTING RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the State must provide direct services to each individual handicapped child with respect to whom the local school district has faltered in the discharge of its responsibilities.

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## BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, PROTECTION AND ADVOCACY, INC., AND MENTAL HEALTH ADVOCACY SERVICES, INC., SUPPORTING RESPONDENTS

This brief by amici in support of Respondents is submitted with written consents of counsel to all parties. Letters of consent have been filed with the Clerk of the Court.

### INTEREST OF AMICI CURIAE

The National Association of Protection and Advocacy Systems represents Protection and Advocacy systems

established pursuant to Section 113 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6042, and Public Law 99-319, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§10801 *et seq.* These agencies have the statutory mandate to protect and advocate the rights of developmentally disabled persons and the rights of persons identified as mentally ill. As part of this mandate Protection and Advocacy agencies represent seriously emotionally disturbed school aged children and other handicapped school aged children in matters arising under the Education For All Handicapped Children Act, 20 U.S.C. §§1400 *et seq.*

Protection and Advocacy Inc., is the agency designated in California pursuant to the Developmentally Disabled Assistance Bill of Rights Act, 42 U.S.C. §6042, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§10801 *et seq.*, to represent developmentally disabled persons and persons identified as mentally ill. During the 1986 fiscal year Protection and Advocacy provided legal assistance to nearly 1300 handicapped school-aged children who experienced difficulty in obtaining a free appropriate public education under the Education for All Handicapped Children Act and State law. The children assisted included numerous students who were threatened with or who had been expelled from school.

Mental Health Advocacy Services, Inc. (MHAS), a nonprofit organization sponsored by the Los Angeles County and Beverly Hills Bar Associations and the Mental Health Association in California, provides legal services to mentally and developmentally disabled clients, including special education students who may be subject to expulsion and/or suspension. In the course



of such representation, MHAS has developed intimate knowledge of the legal and practical aspects of suspension and expulsion proceedings as they affect special education students.

## STATEMENT OF THE CASE

Amici incorporate by reference the statement of the case as presented by Respondents John Doe and Jack Smith.

## SUMMARY OF ARGUMENT

The Ninth Circuit held the State educational agency responsible for directly providing services to a handicapped pupil whenever a local educational agency was unable or unwilling to serve the pupil, provided that the local agency's breach was significant and provided that the State had notice of the breach and had a reasonable opportunity to compel compliance. The holding that the State, as a condition of receiving federal funds under the Education For All Handicapped Children Act, is in effect the educator of last resort is a holding which is consistent with the underlying purpose of the Act: to ensure that all handicapped pupils within the State receive an appropriate education. This holding is consistent with the State's monitoring responsibilities contained in Section 1412(6) and the explicit direct service responsibilities contained in Section 1414(d) of the Act. Moreover, the holding is reasonable in that it narrowly prescribes the circumstances under which the State educational agency is required to intervene to enforce the rights of all handicapped children. It is also reasonable because the obligation to provide services directly can be met by a transfer to a local school district able to meet the handicapped child's needs or by a private school placement.

## ARGUMENT

### THE NINTH CIRCUIT RULING REQUIRING A STATE EDUCATIONAL AGENCY TO PROVIDE SERVICES DIRECTLY WHEN A LOCAL EDUCATIONAL AGENCY IS UNWILLING OR UNABLE TO PROVIDE A HANDICAPPED CHILD WITH A FREE APPROPRIATE PUBLIC EDUCATION IS CORRECT AND WILL NOT UNNECESSARILY BURDEN THE STATE.

### 1. California Is Obligated To Serve All Handicapped Children Residing Within The State As A Condition Of Receiving Assistance Under The Education For All Handicapped Children Act.

The Education For All Handicapped Children Act, 20 U.S.C.§§1400 *et seq.*, was passed in response to Congressional findings which in part determined that

> One million of the handicapped children in the United States are excluded from the public school system and will not go through the educational process with their peers.

20 U.S.C. §1400 (b)(4). Moreover, the legislative history reflects that

> Whereas the actions taken at the state and national levels over the past few years have brought substantial progress, the parents of a handicapped child or a handicapped child himself must still too often be told that adequate funds do not exist to assure that child the availability of a free appropriate public education.

Senate Report 94-168, 94th Congress, p.8, reprinted [1975] U.S. Code Cong. & Admin. News, p. 1432.



In response to the above Congressional findings, the Education For All Handicapped Children Act

> provides federal money to assist State and local agencies in educating handicapped children and conditions such funding upon a State's compliance with extensive goals and procedures.

*Bd. of Educ. of The Hendrick Hudson Unified School District v. Rowley,* 458 U.S. 176, 179, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). As this court recognized in *Irving Independent School District v. Tatro,* 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d. 664 (1984):

> A primary condition is that the State implement a policy that assures *all* handicapped children the right to a free appropriate public education. 20 U.S.C. §1412(1).

*Id.* at 889 (emphasis added). *Accord, Rowley, supra,* 458 U.S. at 180-181.

As a means of implementing the policy assuring an appropriate education for all handicapped children, the Act requires the State to submit a plan on behalf of all agencies who serve handicapped children in the State and requires the plan to set forth the procedures undertaken to insure that

> a free appropriate public education will be available for *all* handicapped children between the ages of three and eighteen not later than September, 1978.

2O U.S.C. §1412(2)(B) (emphasis added).

California as a condition of receiving funds under the Education For All Handicapped Children Act is obligated to insure that all handicapped children within the State receive an appropriate education program. The Ninth Circuit ruling requiring the State educational

agency to provide services directly in certain circumstances follows ineluctably from that mandate.

**2. The Education For All Handicapped Children Act Obligates The State Educational Agency To Provide Services Directly As A Means Of Insuring That Handicapped Pupils Receive An Appropriate Education.**

The Education For All Handicapped Children Act explicitly designates the State educational agency as the entity responsible for assuring that each handicapped child receives an appropriate education (20 U.S.C. §1412(6)) and explicitly and implicitly recognizes the State educational agency's obligation to provide services directly as one means of assuring that its responsibility under the Act is met. Moreover, it is clear that the State's direct service obligation extends to serving individual pupils whom the local educational agency refuses to serve. The State educational agency's responsibility to provide services directly in individual instances of local inaction flows from two sources: the State's monitoring and enforcement responsibilities contained in Section 1412(6) and the direct service responsibilities contained in Section 1414(d).[1]

[1]The obligations imposed upon the State educational agency under the Act with respect to handicapped children are consistent with the obligations imposed under California's Constitution as interpreted by its Supreme Court. As a matter of State law, local districts are State agencies for purposes of discharging the State's educational obligations to its children. Contrary to the characterizations of Petitioner, there is no Chinese Wall between the State and local districts. "Article IX of the [California] constitution makes education and the management and control of the public schools a matter of state care and supervision." *Kennedy v. Miller*, 97 Cal. 429, 431 (1893). "[T]he management of the public schools is a state affair, and school districts at most are but a state agency for that purpose." *Board of Education v. Davidson*, 190 Cal. 162, 168 (1922); *Hall v. City of Taft*, 47 Cal.2d 177, 179 (1956). In the latter case the California Supreme Court explained

> It is said in *Piper v. Big Pine School Dist., supra*, 193 Cal. 664, 669: 'It [the education of the children of the state] is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state.'[Citations ommitted.]'The beneficial ownership of property of the public schools is in the state. It is said in *Pass School Dist. v. Hollywood City School Dist., supra*, 156 Cal. 416, 419: To the contention that a transfer of ownership thus accomplished works the taking of property without due process of law, it should be sufficient to point out that in all such cases the beneficial owner of the fee [of public school property] is the state itself, and that its agencies and mandatories—the various public and municipal corportions in whom the title rests—are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs. . . .'

*Hall v. City of Taft, supra*, 47 Cal.2d at 181-182.



**A. Legislative History and Section 1412(6)**

Section 1412(6) of the Act vests the State educational agency with responsibility for assuring that the requirements of the Act—including the requirement that all handicapped children within the State receive an appropriate education—are carried out. 20 U.S.C. §1412(6), 34 C.F.R. §300.600. The legislative history explicitly recognizes that Section 1412(6) was

> included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the

implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State education agency shall be the responsible agency.

The Committee considers the establishment of single agency responsibility for assuring the right to education of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children. . . . The responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.

S. Rep. No. 94-168, 94th Congress, p. 24, reprinted [1975] U.S. Code Cong. & Admin. News, p. 1448.

**B. Circuit Court Interpretations of Section 1412(6).**

Numerous Circuit Courts have considered the nature and extent of State educational agencies' responsibilities under Section 1412(6). While the responsibilities imposed by courts under Section 1412(6) varied from case to case, the Circuit Courts have persuasively and uniformly held that the State educational agency's responsibility extends well beyond supervision and activities to compel local compliance.

In *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), the Fifth Circuit upheld the entry of a preliminary injunction against the State defendants on the basis that "the State officials were empowered to intervene in the expulsion proceedings under 20 U.S.C. §1412(6)." *Id.* at 350. In *Kruelle v. New Castle County School District*,



642 F.2d 687 (3rd Cir. 1981), the Third Circuit dismissed the State's contentions that it "functions only as a supervisory agency" and upheld the district courts decision to place ". . .the burden for coordinating efforts and financial arrangements for Paul's education on the State Board of Education." *Id.* at 697. In so doing the Third Circuit noted the ". . .congressional perception of the State's primary responsibility to provide a publicly-supported education for all children." *Id.* at 696. In *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), *vacated in part* 468 U.S. 1213 (1984), *cert. denied*, 469 U.S. 1228 (1985) the 11th Circuit upheld the trial court's determination that both Section 1412(6) and Section 1414(d) of the Act

> . . . place responsibility on the State educational agency to make sure that local agencies provide adequate educational services to handicapped children, or to provide directly such services themselves.

*Georgia Ass'n of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263, 1278 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983), *vacated in part*, 468 U.S. 1213 (1984), *Cert. denied*, 469 U.S. 1228 (1985).

The Eighth Circuit in *Yaris v. Special School District of St. Louis County*, 728 F.2d 1055 (8th Cir. 1984), upheld the trial court's "well reasoned" decision which granted a preliminary injunction against the State educational agency for its policy which precluded services beyond the traditional school year and which denied an injunction against the local educational agency. The *Yaris* trial court relying on section 1412(6) explained

> it is the responsibility of the State educational agency either to make sure that local agencies provide adequate services to handicapped

> children or to provide these services. [citation omitted] Therefore the . . . [local educational agency] will not be adjudged to have breached a duty imposed by The Education For All Handicapped Children Act. However, it will have a joint obligation with the State in the future to provide the severely handicapped with an appropriate education, although ultimate responsibility will still fall on the State.

558 F.Supp. 545, 560 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984).

Congress was intent on insuring that the State educational agency was the single agency ultimately responsible for implementing all provisions of the Act and explicitly recognized that single agency designation was essential for insuring that all handicapped children receive the services mandated by the Education For All Handicapped Children Act. While Congress provided a variety of methods for the State educational agency to monitor compliance, nothing in the Act suggests that the State educational agency's responsibility ends with monitoring. The State educational agency is unequivocably responsible for assuring that all handicapped children receive services; that may mean that the State educational agency must provide services directly as a logical extension of that responsibility.

### C. State Agency Responsibility Mandated Under Section 1414(d).

Section 1414(d) of the Education For All Handicapped Children Act sets forth a number of situations when State educational agencies are required to provide direct services. Petitioner asserts that its responsibility under Section 1414(d) is limited to serving handicapped children when a local program is not available and to serving severely handicapped pupils who require services



from State schools. Petitioner's Brief, page 15. Petitioner's narrow view of its responsibility is not justified by any provision of the Act and conflicts with the unambiguous requirements of Section 1414(d).

Section 1414(d)(1) requires the State educational agency to provide special education directly whenever it determines that a local educational agency

> is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in Subsection (a) of this Section.

Subsection 1414(a) in pertinent part requires local educational agencies to identify, evaluate, and serve *all* handicapped children residing within their jurisdiction. Thus if a local educational agency is unable to fulfill its responsibility under Section 1414(a) to establish programs for all children, the State educational agency is required under Section 1414(d)(1) to provide services directly. Use of the inclusive word "all" in Subsection 1414(a)(1) leaves no doubt that every child within the District is to be served. Incorporation of this requirement into 1414(d) makes clear and underscores the State educational agency's responsibility to serve directly any child or children not served by the District.

Section 1414(d)(3) requires the State educational agency to provide services directly when it determines that a local educational agency "has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children." Petitioner contends that Subsection 1414(d)(3) applies only to severely handicapped students who could be better served by attending state schools for the deaf or blind. Petitioner's Brief, page 15. Petitioner's narrow interpretation is not supported by

a fair reading of the Subsection. Subsection 1414(d)(3) does not, by its terms, limit application to severely handicapped pupils. Rather the Subsection applies to a pupil with any handicapping condition. Handicapped children by statutory definition include children who have been identified as:

> mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired or other health impaired children, or children with specific learning disabilities, who by reason thereof requires special education and related services.

20 U.S.C. §1401. Nothing in Section 1414(d)(3) indicates an intent to limit application of that section to severely handicapped pupils. The Act makes no reference to specific rights that severely handicapped pupils enjoy and which are denied to non-severely handicapped pupils. Rather the purpose and promise of the Act extends to all handicapped children

> to insure that *all* handicapped children have available to them a free appropriate public education. . . .

34 C.F.R. §300.1(a) (emphasis added); *Accord,* 20 U.S.C. §1400.

Consistent with the Act's design in permitting the State maximum flexibility in complying with the Act's requirements, Section 1414(d)(3) does not explicitly or implicitly state that only severely handicapped pupils can best be served by regional or State centers. Rather, the section on its face includes all handicapped children including those children the local agency refuses or wrongfully neglects to serve.



### 3. Requiring The State Educational Agency to Provide Services Directly Is Not Unnecessarily Burdensome Because of the Variety of Ways the State Can Fulfill Its Direct Service Obligations.

Petitioner argues that the State does not have the resources to provide services directly in that it has "no roving teams of trained personnel". Petitioner's Brief, p.18. Petitioner further argues that requiring the State to provide direct services would necessitate participation in a variety of unworkable administrative procedures such as "competitive bidding" and "compliance with affirmative action requirements.". Petitioner's Brief, p.18. This argument is without merit because of the discretion given to the State educational agency in fulfilling its direct service obligation.

The regulations implementing the Education For All Handicapped Children Act specify

> . . . the State education agency may provide special education and related services . . . in the manner and at the location it considers appropriate.

34 C.F.R. §300.361. The regulations also suggest a number of methods by which the State can meet its obligation. The State

> may provide special education and related services directly, by contract, or through other arrangements.

34 C.F.R. §300.360.

One method for providing services is placement in private schools. The Education For All Handicapped Children Act and the implementing regulations specifically authorize a public agency including the State educational agency to place handicapped children in

private schools as a means of insuring they receive a free appropriate public education. 20 U.S.C. §§1412(5), 1413(a)(4)(b); 34 C.F.R. §300.347. Consistent with Federal law, the California statutory scheme provides for placements in non-public schools.[2] California Education Code §56365 (West 1987). In addition, under California statutes pupils can be given inter-district transfers to attend public schools located within the jurisdiction of other local educational agencies. California Education Code §§56172 and 46600 (West 1987). Given the availability of private schools and public school programs in other districts the State educational agency should encounter no difficulty in implementing its obligation to serve directly individual handicapped pupils.

Finally, the State cannot seriously contend that imposition of a direct service requirement will be a financial burden. The Education For All Handicapped Children Act specifies that whenever the State educational agency provides direct services

> the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area serviced by such local educational agency.

---

[2]The current directory of certified private schools published by the California State Department of Education, identifies approximately ninety private schools which have been certified by the State to serve handicapped students. *Nonpublic School Directory 1986-87*, State Department of Education, Sacramento, California.



20 U.S.C. §1414(d). The State therefore is entitled to receive the same financial support as is available to local educational agencies when it provides services directly.

**4. Requiring The State Educational Agency To Provide Services Directly Does Not Circumvent The Due Process Procedures Set Forth In Section 1415 Of The Act.**

The Ninth Circuit and District Court narrowly defined the circumstances triggering a State's responsibility to provide direct services. The Ninth Circuit held that the State educational agency

> is not obliged to intervene directly in an individual case whenever the local agency falls short of its responsibility in some small regard. The breach must be significant (as in this case), the child's parents or guardian must give the responsible State officials adequate notice of the local agency's noncompliance, and the State must be afforded a reasonable opportunity to compel local compliance.

*Doe v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986). The injunction issued by the District Court provides illustrative examples of when direct service intervention is likely to be required:

> . . .services shall be provided by the State directly when, for example, the local educational agency fails either to develop or implement an IEP determination and also fails to properly appeal such determination to the State educational agency.

Order and Permanent Injunction, April 23, 1984. JA 244, 249. These decisions recognize that the State educational agency's responsibility for providing direct

services arises only under narrowly limited circumstances, circumstances in which the due process procedures contained in Section 1415 would not be effective.

The due process procedures contained in Section 1415 afford the parent and public agency the right to request an administrative hearing when there is a dispute about the pupil's identification, evaluation, placement or provision of educational services. 20 U.S.C. §1415(b)(1)(E). There are, however, a number of occasions when use of these procedures would not be effective. If a parent and local agency agree to the content of the Individual Education Plan (IEP) but the local agency fails to provide the service specified on the IEP, there is no dispute within the meaning of Section 1415(b)(1)(E) and use of the Section 1415 procedures would not be effective. Similarly, if following a hearing convened pursuant to Section 1415(b)(1)(E) the local educational agency refuses to implement the hearing decision, resorting to the administrative hearing procedures similarly would be futile.

A recent case illustrates the inadequacies of the Section 1415 procedures. In *Wilson v. McDonald,* No. 85-506, slip op. (E.D. Ky. May 15, 1987), the local educational agency refused to implement an adverse administrative decision even though the State educational agency had imposed sanctions. In requiring the State to ". . . directly provide plaintiff with a free appropriate public education. . . " (*Id.* at 6) the Court noted:

> It is apparent from the record that [State] defendants had notice of the County's noncompliance and were given sufficient time to remedy the situation long before they finally sanctioned the County for its dereliction of duty (a period of approximately one year and eight months



> elapsed from the time the hearing officer rendered his decision to the time defendants sanctioned the County for noncompliance). Defendants have also had an additional period of approximately one year and four months since they sanctioned the County to further attempt to compel local compliance or alternatively directly provide services to plaintiffs themselves.

*Id.* at pp. 6-7. Thus, in instances such as those discussed in *Wilson,* where the breach was significant and local compliance could not be compelled, it would be appropriate for the State to provide services directly until such time as the State could compel compliance by the local educational agency. To do otherwise would result in a denial of services to handicapped pupils.

## CONCLUSION

The Education For All Handicapped Children Act, passed in response to Congressional findings documenting the exclusion of significant numbers of handicapped students from school, guarantees all handicapped children the right to an appropriate education. While in practice responsibility for providing services is delegated to local educational agencies, Sections 1412(6) and 1414(d) of the Act unequivocably indicate a Congressional intent for a central point of responsibility within the State educational agency — a responsibility the State educational agency cannot abdicate. As a result the Act unmistakably obligates the State educational agency to ensure that the services are provided and to provide the services directly when the State cannot compel local compliance.

The Ninth Circuit ruling requiring the State educational agency to act as the educator of last resort and to provide services directly in certain cicumstances is consistent with the federal statutory framework. Moverover, given the numerous public and private options for serving handicapped pupils, the ruling will not administratively or financially burden the State. The Ninth Circuit ruling ensures that the promise of the Act will be fulfilled and therefore should be upheld.

Dated: June 22, 1987

PROTECTION & ADVOCACY, INC.

By Catherine Blakemore
*Attorneys for Amici Curiae*
*National Association Of*
*Protection and Advocacy Systems,*
*Protection and Advocacy, Inc.*
*and Mental Health Advocacy Services, Inc.*

# APPENDIX

Eastern District of Kentucky
FILED

MAY 15 1987

AT LONDON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF KENTUCKY**
**LONDON**

CIVIL ACTION NO. 85-506

LINDA WILSON, ET AL. PLAINTIFFS,

VS: **MEMORANDUM**

ALICE McDONALD, ET AL. DEFENDANTS.

This matter is before the Court on various motions filed by both the plaintiffs and the defendants. The Court, in a separate Order, has sustained a motion filed by plaintiffs requesting that the Court approve and enter a settlement and compromise agreement between them and the county defendants (hereinafter "the county"). Therefore, the county's motion, filed on September 4, 1986, for an extension of time to respond to plaintiffs' motion for partial summary judgment will accordingly be denied as moot.

The compromise agreement, however, does not resolve this matter as between the plaintiffs and the state defendants (hereinafter "defendants"). As a result, the Court must consider the following: (1) plaintiffs' motion for partial summary judgment; and (2) defendants' motion to dismiss and plaintiffs' response thereto.

**APPENDIX**

Finding merit in plaintiffs' motion for partial summary judgment and defendants having failed to respond to said motion, in accordance with LR 7(c) E.D.KY, the Court will grant plaintiffs' motion for partial summary judgment. As the granting of this motion establishes that the administrative decision rendered on April 19, 1984, is *res judicata* on the merits of plaintiff's, Bobby Wilson's, (hereinafter "plaintiff") entitlement to a free appropriate public education consistent with the requirements of the Education of Handicapped Act, 20 U.S.C. §1400 *et. seq.*, (hereinafter "EHA"), the only issue left to be resolved by the Court is whether defendants have fulfilled their responsibilities under the EHA to ensure that plaintiff receives the type of educational program established in the hearing officer's decision.

Defendants, in their motion to dismiss, address the foregoing issue and have filed two affidavits to support their arguments. Plaintiffs, in their response to said motion, assert that since defendants have requested the Court to consider documents outside the pleadings, the motion to dismiss should be treated as a motion for summary judgment. Plaintiffs additionally argue that they, rather than defendants, are entitled to summary judgment on the issue of whether the state has met its obligations to them. The Court will therefore consider defendants' motion to dismiss and plaintiffs' response thereto as cross motions for summary judgment pursuant to FED.R.CIV.P. 56.

In defendants' memorandum in support of their motion, they maintain that by having coordinated, directed, and monitored a special educational program for plaintiff, and by sanctioning the county for its noncompliance with the hearing officer's decision, they have taken every statutorily permissible step to provide plaintiff with a free appropriate public education. They



have filed the affidavits of the present associate superintendent for the Office of Education for Exceptional Children (hereinafter "OEEC") and the associate superintendent for that office at the time this matter originally arose to support their contentions.

Plaintiffs, in their response to defendants' motion, argue that defendants' efforts have been limited and that the county, although eventually having been sanctioned, should have been denied funds by defendants long before such withdrawal of funds actually occurred. They assert that the law clearly requires defendants to do everything necessary to ensure that plaintiff receives a free appropriate public education, even if that means that they must directly provide the educational services to him themselves.

The state defendants in this action consist of the Kentucky State Department of Education (hereinafter "KSDE"), the OEEC, the Kentucky State Board of Education (hereinafter "KSBE"), and various officers of these entities in their official capacities.

Pursuant to KRS 157.220, the KSDE is designated as the agency for cooperation with the federal government in carrying out the provisions of the state special educational programs and thus is the administrative agency through which federally appropriated funds for handicapped children are disbursed to the local school districts. The Bureau of Education for Exceptional Children (referred to by the parties and the Court in this memorandum as the OEEC) is the agency within the KSDE created to coordinate, direct, and monitor a program for the exceptional children of Kentucky. *See* KRS 157.221 and KRS 157.224. Pursuant to KRS 157.220, the KSBE is responsible for making the necessary rules and regulations for the proper administration of the special education programs.

Therefore, it appears that the above state defendant agencies, and their officers in their official capacities, comprise the central educational administrative authority for the state of Kentucky that receives federal funds for disbursement to county programs and administers and monitors the programs set up for the purposes of carrying out the provisions of the EHA. The first issue to be decided is whether these defendants bear the ultimate responsibility for ensuring that handicapped students receive a free appropriate public education under the EHA or whether this responsibility can be delegated to the county agencies.

In *Kruelle v. New Castle County School District,* 642 F.2d 687, 696-97 (3d Cir. 1981), the Third Circuit Court of Appeals held that the district judge did not err in assigning the ultimate responsibility for implementing the requirements of the EHA to the state board of education rather than the local school district. Similarily, in *Parks v. Pavkovic,* 557 F. Supp. 1280, 1288 (N.D. Ill. 1983), *modified on other grounds*, 753 F.2d 1397 (7th Cir.), *cert. denied,* ___ U.S. ___, 105 S.Ct. 3529 (1985), the court held that the state agency in that case could not rely of other agencies' derelictions and stated that "the responsibility for assuring compliance with the EHA lies with it [the state agency] and it alone." *See also North v. District of Columbia Board of Education,* 471 F. Supp. 136 (D.D.C. 1979).

After having reviewed the cases cited above, 20 U.S.C. § 1412(6), and 30 C.F.R.§ 300.600 (1986), along with the *Comments* thereto, the Court finds that the state defendants are ultimately responsible for effectuating the requirements of the EHA. These statutory and regulatory provisions exhibit a Congressional intent for a central point of responsibility and accountability under the EHA that cannot be abdicated. Consequently, the only issue



left to be resolved is whether these defendants were required to directly provide plaintiff with a free appropriate public education when it became apparent that the county was not going to do so.

The court in *Georgia Association of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263, 1278 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983), *vacated on other grounds*, 468 U.S. 1213 (1984), held that the EHA "places the responsibility on the state educational agency to make sure that local agencies provide adequate educational services to handicapped children, or to provide directly such services themselves." *See also Yaris v. Special School District of St. Louis County,* 558 F. Supp. 545, 560 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984).

In *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1478 (9th Cir. 1986), the trial court "directed the state to provide services directly when, in any individual case, a local educational agency is unable or unwilling to provide eligible students with a free appropriate public education as mandated by the [EHA]." The state argued in that case that it was responsible for providing direct services only when the local educational agency maintained no programs of special education whatsoever. The court, however, did not agree and held that the state is obligated to provide direct services when the following things have occurred: (1) there is a significant breach of responsibility by a local educational agency; (2) the state agency is given notice of the noncompliance; and (3) the state is afforded a reasonable opportunity to compel local compliance. The court further held that this obligation exists even if there is only one child involved. *See Doe,* 793 F.2d at 1491-92.

Turning to the case at bar, it appears that three years have elapsed since the hearing officer rendered his decision. Within that time period defendants have taken some positive steps to administer an appropriate education to plaintiff via the county and did eventually impose sanctions on the county for its noncompliance with the hearing officer's decision. However, based on the foregoing authority, the state defendants were required under the EHA to *directly* provide plaintiff with a free appropriate public education when it became apparent that the county was not going to do so.

The county significantly breached its responsibilities by failing to implement the hearing officer's decision within a reasonable period of time. It is apparent from the record that defendants had notice of the county's noncompliance and were given sufficient time to remedy the situation long before they finally sanctioned the county for its dereliction of duty (a period of approximately one year and eight months elapsed from the time the hearing officer rendered his decision to the time defendants sanctioned the county for noncompliance). Defendants have also had an additional period of approximately one year and four months since they sanctioned the county to further attempt to compel local compliance or alternatively directly provide services to plaintiff themselves. Therefore, even under the stricter standard enunciated in *Doe*, where a three-part test must first be satisfied before the state agency is required to directly provide educational services to a handicapped child, the state defendants in the instant case should have directly provided plaintiff with an appropriate education as set forth in the hearing officer's decision.

As the hearing officer's decision remains to be effectuated, the state defendants have evidently failed to fulfill their responsibility to directly provide plaintiff



with a free appropriate public education pursuant to the EHA. Therefore, for the reasons stated herein, plaintiffs' motion for summary judgment will be granted and defendants' motion for summary judgment will be denied. An appropriate Order will be entered this date.

This 15 day of May, 1987.

EUGENE E. SILER, JR.
Chief Judge

**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 22, 1987, I served the within *Brief of the National Association of Protection and Advocacy Systems, Protection and Advocacy, Inc., and Mental Health Advocacy Services, Inc., Supporting Respondents* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
*(Original and forty copies)*

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San Francisco, California 94101

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 22, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
*(Original signed)*

# AMICUS CURIAE

# BRIEF

No. 86-728

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT,
OF PUBLIC INSTRUCTION,
*Petitioner,*

VS.

JOHN DOE AND JACK SMITH,
*Respondents.*

**On Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF SENATORS CHAFEE, ET AL. AND OF REPRESENTATIVES BIAGGI, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI CURIAE*

This amicus brief is submitted on behalf of Senators John H. Chafee, Tom Harkin, Edward M. Kennedy, John F. Kerry, Howard M. Metzenbaum, Paul Simon, Robert T. Stafford, Lowell P. Weiker, Jr., and Representatives Mario Biaggi, Tony Coelho, Don Edwards, William Ford, James M. Jeffords, Austin Murphy and Major R. Owens.

Some of the amici were original co-sponsors of the Education for All Handicapped Children Act (EHA): Senators Kennedy, Simon, and Stafford and Representatives Biaggi, Ford and Jeffords. Senators Kennedy and Stafford served on the Subcommittee on the Handicapped of the Labor and Human Resources Committee which actually drafted Pub. L. 94-142.

The amici include the Chairman of the committee with jurisdiction over the EHA, Senator Kennedy; the current Chairmen of the subcommittees with jurisdiction over the EHA (Senator Harkin and Representative Owens); former Chairmen of the subcommittees with jurisdiction over the EHA (Senators Simon and Weicker and Representative Murphy); ranking minority member of the House Committee with jurisdiction over the EHA (Representative Jeffords); current ranking minority member of the subcommittee with jurisdiction over the EHA (Senator Weicker); former ranking minority member of the subcommittee with jurisdiction (Representative Kerry).

As Members of Congress who are responsible for legislating education issues, amici offer this brief to assist the Court in reaching its decision.



* Petitioner and Respondent have both consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The plain language of the Education for All Handicapped Children Act, or P.L. 94-142 (hereinafter referred to as the EHA), and, its legislative history make clear that school districts may not indefinitely suspend a handicapped student or unilaterally change his/her placement based on handicapped-related behavior pending the administrative and judicial proceedings provided for in the Act.1/ The entire

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1/ Case law also supports this interpretation. See e.g. Kaelin v. Grubbs, 682 F.2d 595, 599-602 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), cert. denied 454 U.S. 1030 (1981); Sherry v. New York State Education Dept., 479 F. Supp. 1328 (W.D. N.Y. 1979); Doe v. Koger, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978). Amici members of Congress do not elaborate on this case law because it has

framework of the EHA is designed to prevent exactly what is proposed by the petitioner and the Department of Justice -- the unchecked authority of school administrators to take an action based on behavior related to a child's handicap without parental consent and without complying with due process procedures.

The Act provides an extensive procedural framework for parent participation which includes the right to challenge any action involving the "identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." 20 U.S.C.

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been adequately addressed in other briefs. Likewise, Amici only address the first issue presented due to the comprehensive treatment of the second issue in other Amici briefs.



Section 1415(b)(1)(E)(1982).

Furthermore, the Act explicitly states that:

> (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . . (Referred to hereinafter as the "stay put" provision.) 20 U.S.C. Section 1415(e)(3) (1982).

The Petitioner argues that the court should ignore this plain language and substitute petitioner's view of "common sense."2/ Howover, the Ninth Circuit's decision in this case gives

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2/ " . . . we believe the most powerful support for our position is basic common sense. . . . , it makes no sense to believe Congress intended that a school district be compelled to return a violent and disruptive child to a classroom while lengthy review proceedings are taking place." (Pet. Brief, at 5).

effect to both the plain language of the statute and "common sense" concerns. The Ninth Circuit not only recognized that schools could utilize up to 30 days suspension,3/ as well as a wide array of instructional behavioral management strategies, but also that schools could seek judicial intervention when these alternatives have not served to alleviate a dangerous situation. At a minimum, the "stay put" provision would require a school district to seek an injunction in order to circumvent the procedures

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3/ The Ninth Circuit's allowance of 30-day suspensions goes against established court and administrative interpretations. Letter to Martha J. Fields, Assistant State Superintendent, Maryland State Dept. of Education, Baltimore, MD 21201-2595; February 26, 1987; from: G. Thomas Bellamy, Director, Office of Special Education Programs, 2 Education for the Handicapped Law Report 211:437-438, 1986-87, EHA Rulings/Policy Letters.



clearly set forth in the Act.

The Petitioner urges this court to rule that the "stay put" provision is "inapplicable." (Petitioner's brief, at 8). The DOJ's argument amounts to the same thing. In fact, DOJ argues that the court abused its discretion by requiring the provisions of the Act to be followed.

The legislative history of the EHA makes clear that Congress did not want to leave decisions regarding placement in the discretion of school officials. The EHA was a Congressional response to a shameful history of exclusion, segregation, inadequate education, and expulsion of handicapped children. See, H.R. No. 332, 94th Cong., 1st Sess. 7 (1975). The issue of expulsion was known to Congress at the time. As this Court stated in Burlington School Comm. v. Dept. of Education, ___

U.S. __, 105 S. Ct. 1996, 85 L Ed 2d 385, 397 (1985):

> . . . the impetus for the Act came from two federal court decisions, Pennsylvania Assn for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (ED Pa 1971) and 343 F. Supp. 279 (1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (DC 1972), which arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from the public schools. (emphasis added)

A recurrent theme throughout the legislative history of the 1975 Act was Congress' strong desire to "strengthen" and "clarify" procedural safeguards to assure against unilateral school district actions. The central role of parental participation has been recognized by this Court in Hendrick Hudson District Bd. of Education v.



Rowley, 458 U.S. 176 (1982), and Burlington, supra. This procedural framework was the result of extensive hearings, studies and deliberations by Congress and cannot be ignored as urged by Petitioner and Justice.

Defendant's proposal would not only be contrary to the letter and spirit of P.L. 94-142 but would also establish extremely bad public and educational policy. School districts would have no incentive to actually develop an appropriate program to address the needs of a disruptive student pending due process procedures.4/ The children excluded before the EHA were the children that the schools found most difficult to

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4/ Cal. Educ. Code Section 48915.5(g) (Deering Supp. 1986) authorizes indefinite suspensions pending completion of administrative and court review when parents exercise their federally granted EHA due process rights.

handle. The legal mandate forced the schools to develop programs and thereby develop the state of the art in educating handicapped children. Educational resources have been developed to deal with disruptive behavior which relate to handicapping conditions. Unfortunately, there is a lack of appropriate programs and adequately trained personnel. Compliance with the law encourages utilization of state of the art educational strategies, while indefinite suspension punishes the child for the system's failings.

## ARGUMENT

### I. The Plain Language of the EHA Prohibits School Administrators From Indefinitely Suspending or Unilaterally Changing a Handicapped Student's Placement Because Of Handicapped Related Behavior.

The "stay put" provision is the



logical extension of the entire framework of the EHA which provides for individualized education designed to meet the unique needs of a handicapped student, parental participation, and due process protections. Petitioner's argument here would undermine this framework by substituting the unfettered authority of school administrators for the carefully developed procedures established by Congress.

The specific provisions of the Act emphasize that school officials must determine each child's needs on an individual basis. The Act requires the school district to provide a "free appropriate public education" for each handicapped child, 20 U.S.C. 1412(2)(B) (1982). That education is defined in part as "special education and related services which are provided in conformity

with the child's individualized education program." The "individualized education program," as defined in 20 US.C. 1401(19) (1982), is one "specially designed . . . to meet the unique needs" of the handicapped child.5/

This education program is to be based on evaluations which the school district must perform for each handicapped child. 34 C.F.R. § 300.530-532. The evaluation must be comprehensive, addressing all aspects of a handicapped child's disabilities, including behavioral difficulties of the sort the plaintiffs experienced. The evaluation must assess "all areas related to the suspected disability,

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5/ This Court referred to the IEP as the "modus operandi" of the Act. Burlington School Comm. v. M.A. Dept of Ed., __ U.S. __, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985).



including . . . emotional status." 34 C.F.R. 300.532(f). The regulations also state that "[i]n interpreting evaluation data and in making placement decisions, each public agency shall . . . [d]raw upon information from a variety of sources, including . . . adaptive behavior," 34 C.F.R 300.533(a)(1) (1986). These placement decisions must be made by individuals "knowledgeable about the child, and the meaning of the evaluation data." 34 C.F.R § 300.533(a)(3).

The educational program for each child must include any "related services" necessary for the child to be able to benefit from special education. Those necessary "related services" include "counseling services," 20 U.S.C. 1401(17) (1982), which is defined in the regulations as "services provided by

qualified social workers, psychologists, guidance counselors, or other qualified personnel." 34 C.F.R. § 300.13(b)(2) (1986). These "related services" therefore include assistance aimed at helping handicapped students adjust their behavior to accepted standards.

Hence, an IEP must develop plans to deal with a child's behavioral problems. When the educational strategies set forth in the IEP are not working to control disruptive behavior, an IEP meeting can be called and the professionals working with the parents can develop new strategies to deal with the problem. There may be many behavioral management strategies that simply may not have been utilized. See Section III, infra. The whole thrust of the EHA is to make the placement fit the unique needs of the child, not to



indefinitely suspend a student that does not fit an existing inappropriate placement. If the IEP team concludes that the current placement cannot be modified to address the behavior problem, a new appropriate educational placement must be developed. If a new placement is recommended that the parent does not believe to be appropriate, the parent has a right to challenge the recommended placement through the due process procedures established in the Act. The statute provides

> an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.6/

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6/ The words "any matter" are emphasized in the Conference Report on the EHA. See H.R. Rep. No. 664, 94th Cong., 1st Sess. 49 (1975).

It is this strong Congressional focus on parent participation7/ and due process that gives rise to 20 U.S.C. § 1415(e)(3) (1982) which provides that

> (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . .

This language could not be more explicit. Congress did not want a school district to have the authority to unilaterally change a child's IEP. Congress certainly wanted to prevent indefinite exclusion. The fact that the

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7/ As this Court recognized in Burlington, supra, 85 L. Ed. 2d 385, 394, "[i]n several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness.



proposed exclusion is based on misbehavior does not change this strongly stated policy. All of the students being excluded prior to the Act posed problems, in one way or other, to school administrators. Congress did not leave it to administrators to decide which students were too problematic to receive an appropriate education. Rather, Congress explicitly provided a procedure to resolve differences and explicitly enjoined placement changes pending these procedures. If a situation is truly "dangerous" and cannot be addressed through educational strategies, the school officials may seek judicial intervention. The court then can insure that the proper steps are being taken to develop an appropriate placement for the disruptive student. Allowing school officials to decide to indefinitely

suspend may be no more than excusing them from not doing their job.

## II. The Legislative History of the EHA Demonstrates That Unilateral Actions By School Officials To Change A Placement or Indefinitely Suspend a Handicapped Student Because of Handicapped Related Behavior Violates Congressional Intent.

Congress passed the EHA in direct response to exclusion, segregation and inappropriate educational services to handicapped students. H.R. Rep. No. 332, 94th Cong., 1st Sess. 7 (1975). In developing a timetable for implementation, Congress determined that first priority must be given to those who were unserved. S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 37-38 (1975). According to a study prepared by the federal Bureau of Education for the Handicapped, 82% of emotionally disturbed



children were unserved in 1974-75. H.R. Rep. No. 332, supra, 12 (1975); S. Report No. 168, 94th Cong. 1st Sess. 8 (1975); 121 Cong. Rec. p. 19,487 (1975).

Children with emotional problems were clearly a concern of Congress. As stated by Congressman Brademus,

> That children with physical or emotional handicaps should be so excluded from an equal educational opportunity is a shame. 121 Cong. Rec. 23,704 (1975)

Congress' attention to the exclusion of handicapped children because of disciplinary problems is further underscored by the repeated references to PARC and Mills, supra; H.R. Rep. No. 332, 94th Cong. 1st Sess. 3 (1975); S. Rep. No. 168, 94th Cong. 1st Sess., 6-8; 121 Cong. Rec. 25,540 (1975). The EHA incorporated the due process protections

set forth in those landmark cases. S. Report No. 168, supra 8.

Of the seven handicapped plaintiffs in Mills, four had been excluded after disciplinary incidents. The Mills court specifically provided that no student could be suspended for more than two days without the right to a due process hearing. 348 F. Supp. 866, 880 (D.C.D.C. 1972). The hearing required included the full panoply of procedural rights later specified in the EHA. In addition, the Mills court held that no suspension could exceed ten days and that educational services must be provided during this time. Id. at 883.

The history of the Act makes clear that Congress was concerned with exclusion of any kind and inappropriate educational services. Congress determined that the best way to assure



that its mandate that every handicapped child receive an appropriate education was carried out was to establish extensive due process procedures to guard against unilateral school district action. Senator Williams, principal author of the Act, explained that

> This conference report establishes as a matter of law a series of comprehensive and carefully thought out provisions which will assure the right to education for all handicapped children in the United States. 121 Cong. Rec. 37,413 (1975).

As this Court stated in Burlington, supra, the IEP is the "modus operandi" of the Act. 85 L. Ed. 2d 385, 394 (1985). The initial educational plan, as well as any revisions must go through the IEP process. Problems caused by disruptive behavior can best be addressed in the IEP process. As stated

by Senator Randolph:

> If the child is not progressing as he or she should, it would be best to identify the problem as quickly as possible. Then we would have the opportunity of correcting the difficulty before a long period of time goes by. 121 Cong. Rec. 19,497 (1975)

Senator Randolph emphasized the importance of the IEP to marshall resources to address a problem.

> . . . individualized planning conferences are a way of targeting the resources of our school systems on handicapped children. 121 Cong. Rec. 19,483 (1975).

Senator Williams characterized the IEP as a necessary protection for parents and students.

> The provisions requiring an individualized education program for each handicapped child are extremely important protections to the parents and child, and highly



> necessary to proper planning and programming for the school district. 121 Cong. Rec. 37,414 (1975).

The IEP process itself guards against unilateral school district action. As further stated by Senator Williams,

> It is intended that all parties will be involved throughout the process of establishment, review and revision of this program. Id.

Senator Stafford stated that the IEP process is

> extremely important if the child's progress is to be adequately monitored and if appropriate steps are to be taken to assure that the problems with the educational process that the child is having are met in a timely and consistent way. 121 Cong. Rec. 19,483 (1975).

The Senate Report specifically addresses the bar on unilateral action by

school officials to change a handicapped student's educational program.

> The Committee has included a requirement that any revision of the statement be done only with the agreement of the parents in order to ensure that services to the child are not arbitrarily curtailed or modified. S. Rep. No. 168, 94th Cong. 1st Sess. 11 (1975)

If a parent disagrees with the school district recommendation, the parent has a right to notice an impartial hearing. 20 U.S.C. § 1415 (1982). Senator Williams, stressed that the 1975 Act strengthened procedural safeguards to

> assure that State and local educational agencies did not make inappropriate decisions regarding the identi- fication, valuation and educational placement of handicapped children. And, if a child's parents disagreed with those decisions they could secure an impartial due process hearing at the State or local level and secure appropriate relief.



> (emphasis added) 121 Cong. Rec. 37,415 (1975).

Congressman Miller stated the need for an impartial hearing

> . . . to safeguard the rights of children and parents which frequently have been abridged or totally ignored. (emphasis added) 121 Cong. Rec 25,540 (1975).

This legislative history alone, without an explicit "stay-put" provision would indicate that Congress did not intend to give school officials unchecked authority to change a student's placement or indefinitely suspend or expel a student for handicap-related behavior. In fact, it appears that 20 U.S.C. § 1415(e)(3) was added to clarify the already existing prohibitions against unilateral school actions. The principal author of the Act, Senator Williams, reported to the floor:

> The provisions of existing law with respect to the binding effect of due process hearings and appropriate administrative and judicial review of such hearings are clarified and language is also adopted to require that during the pendency of any administrative or judicial proceedings regarding a complaint, unless the State or local educational agency and the parents or guardian of the child otherwise agree, the child involved in the complaint shall remain in his or her present educational placement . . . . 121 Cong. Rec. 37,416 (1975).

See also; S. Conf. Report No. 455, 94th Cong., 1st Sess. 50 (1975).

Petitioner cites the following quote by Senator Stafford to support its argument that § 1415(e)(3) should be ignored.

> The conference agreement strengthens and clarifies the provisions of existing law regarding procedural safeguards and due process



> procedures. The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus, the conference adopted a flexible approach to try to meet the needs of both the child and the State.

The end of that quote is very relevant for the interpretation of Senator Stafford's meaning.

> I might add that most States have already enacted statutes to implement the existing law provisions which were added by my amendments last year. The conferees had no desire to have States have to act again to meet a Federal standard. 121 Cong. Rec. 37,412 (1975).

Any interpretation of Senator Stafford's comment must be consistent with both the

plain language of the statute and the Senator's agreement with the strengthening of the procedural safeguards of existing law. Senator Stafford believed that the system established a "flexible approach" for several reasons. Flexibility is provided in the statute by allowing school officials and parents to agree on an interim placement pending due process procedures. Allowing states to establish their own procedures also provided a "flexible approach." The full quote above refers to the states enacting statutes to comply with the Education Amendments of 1974 (which Senator Stafford authored) that required establishment of administrative hearing procedures. These procedures varied greatly from state to state. Senate Conf. Rep. 455, 94th Cong., 1st Sess. 49



(1975). Senator Stafford supported a "flexible approach" which allowed states to establish their own procedures as long as certain Federal guidelines were followed. Moreover, in an article Senator Stafford wrote on the EHA provisions, Education for the Handicapped: A Senator's Perspective, 3 Vt. L. Review 71, 78 (1978), he stated that these administrative procedures

> afford a timely, fair system for resolving conflicts. In this way, the number of cases going to court has been reduced.

Hence, Senator Stafford also believed that the establishment of administrative hearings, itself, reduced delay and provided a flexible approach for resolving complaints. It is entirely clear that Senator Stafford's quote about strengthening the safeguards in the Act cannot serve to defeat the explicit

language of the statute as petitioner urges.

The legislative history overwhelmingly illustrates Congress' desire to prohibit unilateral school actions. Certainly actions which result in lengthy exclusions must fall within the carefully designed due process procedures.

## III. Indefinite Suspensions of Handicapped Children In Violation Of The Procedural Safeguards Of The EHA Are Contrary To Public And Educational Policy.

Suspension for handicapped related behavior puts the blame on the handicapped child instead of on the inadequacies of the system. This is exactly what Congress sought to avoid in enacting the EHA. Furthermore, as a practical matter, suspension does nothing to further educational goals or the



development of a healthy and harmonious society.8/ Behavioral problems, disruption and safety in the public schools are matters of grave concern. Of equal concern is the denial of educational services and official violation of student rights that result from disciplinary exclusion.

In resolving these problems we are not faced with an either/or situation. We do not have to choose

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8/ In fact, suspension, expulsion and school failure are highly correlated with social problems. Researchers have established a relationship between learning disabilities, behavior problems, school failure, drop out rates, and juvenile delinquency. See Brodan, Peters, Zimmerman, The Relationship Between Self-Reported Juvenile Delinquency and Learning Disabilities: A Preliminary Look at the Data. Creighton Institute for Business Law and Social Research Report Series. Bachara, and Zaba, Learning Disabilities and Juvenile Delinquency. 11 J. of Learning Disabilities 58 (1978).

between school chaos and denying education to handicapped children to maintain decorum in the schools. Congress believed that the system could be modified in a manner that would protect the interests of all students and school personnel by requiring the development of appropriate programs, providing supportive or related services, training personnel, and tailoring educational programs to the unique needs of the individual handicapped child. When all of these components are put together effectively, as the law requires, indefinite suspension from school should be unnecessary.9/

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9/ In the rare situation where appropriate educational strategies are properly utilized and fail, school officials may seek court intervention as recognized by the Ninth Circuit.



### A. Disciplinary Suspensions Blame Children For The Inadequacies Of The System

Excluding a handicapped child with behavior problems because of handicapped-related disruptive behavior is no different than excluding a learning disabled child because she is having difficulty reading, or a mentally retarded child for not understanding directions. Children who are assessed and identified as having severe emotional or behavioral problems singly or in combination with other handicaps have extreme difficulty conforming their behavior to acceptable norms.10/

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10/ Most researchers believe that neurological characteristics commonly associated with learning disabilities and severe emotional disabilities such as poor impulse control and hyper-activity cause these children to be more susceptible to engaging in misconduct. See Lewandowski and Forsstrom-Cohen,

To exclude these children and deal with them as if their behavior were their "fault" negates the entire purpose of identifying and assessing their handicaps in order to educate and socialize them appropriately. If these children must first rid themselves of their disability - their behavior disorder - in order to remain in school then Congress essentially did nothing to address the needs of these children. As educational researchers Barnett and Parker characterize the issue, "the question goes beyond what are proper suspension/expulsion procedures for the behaviorally disordered to a concern for proper placement, thoroughness of the individual education plan and the

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Neurological Bases of Youth Violence, in Youth Violence (S. Apter and A. Goldstein eds.) (1986).



presence of previously planned disciplinary measures". Barnett and Parker, Suspension and Expulsion of the Emotionally Handicapped: Issues and Practices, 7 Behavioral Disorders 3 (1982) at 178. A number of critical factors contribute to the inadequacies of the system and the failure to appropriately serve handicapped children with behavior problems.

### 1. Inappropriate Placements and Poor Programming Fail to Positively Address Behavior Problems.

Placement in inappropriate programs where children's behavioral and learning needs are not being met exacerbate or even create problems and sets the stage for misbehavior resulting in disciplinary suspensions. Leone, Suspension and Expulsion of Handicapped

Pupils, 19 J. of Special Education 111 (1985) at 119-120. Frustration, anger and subsequent aggression are closely related to school failure and inappropriate educational programs. Furthermore, almost any otherwise well-behaved child whose needs are not being met or properly addressed -- dyslexic, speech impaired, hearing impaired -- may suffer from cumulative frustration and confusion and may present behavior difficulties. Id.

Education experts generally agree that state of the art instructional strategies in educating children with behavior disorders are not being implemented. Smith and Wood, Education of Behaviorally Disordered Students: Accomplishments, Problems and Prospects, Council for Children with Behavioral Disorders, Council for Exceptional



Children, Reston, Virginia (1986) at 9-10; Holt and Smith, Decorum Versus Discipline in Programming For Behaviorally Disordered Students, in Positive Alternatives To The Disciplinary Exclusion of Behaviorally Disordered Students, (Grosenick and Huntze, eds.) National Needs Analysis In Behavioral Disorders, University of Missouri-Columbia (1984) at 28-29. Not only are children with behavior problems often inappropriately placed prior to the incidents which lead to suspension, but even programs developed specifically for behaviorally disordered children, frequently do not utilize the state of the art practices that are described in the educational literature and used in exemplary programs. Grosenick & Huntze, Human Resource Issues in Behavior Disorders, in National Needs Analysis in

Behavior Disorders, Univ. of Missouri - Columbia (1980). The lack of implementation is thought to derive from a number of problems including ill-defined program philosophy and goals, lack of teacher training, lack of administrative leadership, inadequate supportive or related services, interagency conflicts, poor individualization of instructional strategies and behavioral management plans, under-utilization of positive alternatives to exclusion, and inadequate in-service training for both regular and special education personnel. Id., see Forness, Sinclair and Russell Serving Children with Emotional or Behavior Disorders: Implications for Educational Policy, 54 Amer. J. Orthopsychiatry 22 (1984).

In the late 1970's, McCauley



and other investigators developed a set of program elements which should be reflected in well-conceptualized programs. McCauley, Elements of Education Programming. Iowa Perspectives, 1977 at 1-4. The National Needs Analysis Project conducted an extensive review of the literature describing programs for behaviorally disordered children and concluded that out of 365 specific programs examined only 81 contained even minimal discussion of these essential program elements. Grosenick and Huntze, More Questions Than Answers: Review and Analysis of Programs for Behaviorally Disordered Children and Youth, National Needs Analysis/Leadership Training Project, Univ. of Missouri - Columbia (1981).

Another study reviewed a representative sample of 40 school

districts' disciplinary policies for handicapped children and found that over half of the policies did not address philosophy, purpose, rights of students or the role of administrators, teachers and parents. Over half contained predetermined consequences for rule infractions but most of these limited consequences to either suspension or expulsion of misbehaving students. The study suggests "a lack of understanding of the law and best current practices for dealing with inappropriate behavior." Peterson and Rosell, Analysis of School District Policies for Disciplinary Action with Handicapped Children, Dept. of Special Education and Communication Disorders, Univ. of Nebraska - Lincoln (1986) at 24.

Rosell and Peterson also concluded that the majority of the



districts employ a punitive attitude toward disruptive behavior which is illustrated by the continued use of long-term suspensions and expulsions. Id. at 25. The lack of a positive philosophical context greatly concerns educators. If the philosophy is geared towards discipline or punishment, then the practice will be punitive and exclusionary rather than oriented toward marshalling professional expertise and the system's resources toward improving behavior. Grosenick and Huntze, Review and Update on Legal Status, In Positive Alternatives To The Disciplinary Exclusion of Behaviorally Disordered Students, supra at 14.

### 2. The Lack of Trained Personnel Contributes to the Failure to Deal Appropriately with Behavior Problems

Another critical factor which contributes to the inadequacy of the system is the shortage of trained qualified personnel to work with behaviorally disordered children. Grosenick and Huntze, Human Resource Issues In Behavior Disorders, supra at 36. In enacting the EHA, Congress recognized that instructional goals, strategies, methods and personnel would need to be developed in order to serve children not being served or being served inadequately. As Senator Randolph stated:

> In recognition of the vital importance of trained personnel to implement the provisions of this legislation, both the State and the local jurisdictions will have certain responsibilities in developing, implementing, and



> maintaining a comprehensive system of personnel development. 121 Cong. Rec. 37,410 (1975). 11/

Consequently, the Act requires that the states develop and implement a Comprehensive System of Personnel Development (CSPD) for in-service training to assure the availability of adequately prepared and trained staff. 20 U.S.C. 1413(a)(3)(1982). It also requires dissemination of research and demonstration projects to bring

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11/ The Legislative history reflects concern about the quality of programs and personnel. ". . . The conferees also stress that inservice training must play a significant role in preparing general and special educational . . . personnel . . . in educating handicapped children." S. Conf. Rep. 455, 94th Cong., 1st Sess. 41 (1975). "Appropriate educational services to handicapped children must be delivered by qualified personnel trained for that specific purpose." S. Rep. No. 168, 94th Cong., 1st Sess. 33 (1975)

"promising education practices" into the classroom. 20 U.S.C. 1413(a)(3)(1982). A review of national CSPD data concluded that compared with other areas in special education, "severely emotionally disturbed is the single most vulnerable program area in special education where manpower is concerned". Smith-Davis, Burke & Noel, Personnel To Educate the Handicapped in America: Supply and Demand From A Programmatic Viewpoint, College Park Maryland, Univ. of Maryland (1984) at 52. Of 54 jurisdictions surveyed in 1984, 25 reported shortages of personnel to educate this category of children. Id.

In California, the shortage is acute. In 1982-83 there were 82 vacancies for teachers in programs for severely emotionally disturbed. U.S. Department of Education. Seventh Annual



Report To Congress on Implementation of Public Law 94-142: The Education for All Handicapped Children Act. Washington, D.C. Special Education Programs (1985).

Teacher training programs are not focusing on this problem. Data from a national survey indicates that only 7 percent of the Institutions of Higher Education have a separate or distinct training program in secondary level behavior disorders. Grosenick and Huntze, National Needs Analysis in Behavior Disorders: Adolescent Behavior Disorders, University of Missouri - Columbia (1980) at 64. In California, there is presently no separate track or credentialling requirement to prepare teachers who work with emotionally or behaviorally disturbed children. In order to remedy this problem additional training in behavior disorders will be

required starting on 1988. 5 Cal. Ad. Code § 80047.2.

The shortage of qualified personnel is greater than these figures indicate since positions are often filled by unqualified personnel with emergency credentials which often require only 6 units of special education classwork. Grosenick and Huntze, Human Resources in Behavior Disorders, supra at 39; 5 Cal. Ad. Code § 80024.3. Congress addressed this same issue of emergency credentials in 1975. Senator Randolph stated:

> During the hearings, [a witness] pointed out that the "shortage of trained personnel is critical." She further commented that 6 hours of emergency training do not prepare regular education teachers to deal with handicapped children. 121 Cong. Rec. 19483 (1975).

The lack of qualified teachers underscores the need for comprehensive



inservice training. As Congress recognized "[i]nservice training . . . can play a significant role in attaining . . . the goal of providing a free appropriate public education . . .." S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 44 (1975). Unfortunately inservice training is also sorely inadequate often amounting to no more than a 2-hour annual presentation on a "popular topic." Grosenick and Huntze. Human Resource Issues in Behavior Disorders, supra, at 89.

It certainly does not make sense to indefinitely suspend a student because the teacher is not properly prepared. Congress knew that increased teacher training was necessary to ensure appropriate educational services.

### 3. Students Are Not Receiving Needed Counseling and Psychological Services

Another critical factor in determining the adequacy of the system for behaviorally disordered children is the lack of related services. The EHA calls for the provision of related services to handicapped students when needed to assist a child to benefit from special education. These services include psychological services, counseling services, and family education. 20 U.S.C. § 1401 (17) (1982); 34 C.F.R. § 300.13. Need for these services must be documented in the IEP. 20 U.S.C. §§ 1401 (18), 1401 (19), (1982). For students with behavioral or emotional disabilities, mental health services can be a critical adjunct to the special education program. However large



numbers of students who need these services are not receiving them. Grosenick, and Huntze, Human Resource Issues in Behavior Disorders, supra at 61; Forness, Sinclair and Russel, supra at 28.

The State of California provides a telling example of the inadequacies in the delivery of mental health services. In California, the State Department of Mental Health is required under a new state statute to provide mental health services to special education students who require them. Cal. Gov. Code § 7570 et seq.

In a 10-month period following the effective date of the statute, the number of referrals for services was more than twice that of special education students who received services in the previous 12-month period. Auditor

General of California, Report: A Review of The Costs of Providing Noneducational Services To Special Education Students, Office of the Auditor General, April, 1987, at 3. This dramatic increase indicates that students' needs for mental health services were not previously included in IEP's and services were not provided when local school districts were primarily responsible for the services. Even children who have been assessed have been placed on waiting lists for services. Id. at 20.

In a report to the California legislature, the Department of Mental Health stated that during the four month start-up period, an alarming 60% of those students assessed for mental health services were deemed in need of services but were "unknown" to local mental health departments. California Department of



Mental Health, Report: Mental Health Services for Special Education Pupils, A Report to the Legislature. 1987, p. 7-8. Presumably no other agency was providing services to these children. Moreover, the report stated that "Of the 39 counties reporting assessments, several, representing a substantial percentage of the State's population performed relatively few [mental health] assessments." Id. at 6.

Any one of the problems described above, placement in inappropriate programs, failure to implement state of the art instructional practices, lack of adequately trained teachers and under-utilization of mental health services can work alone or in combination to deprive a handicapped child of an appropriate education which properly addresses the child's behavioral

and psychological needs.

Punishing a disruptive child by exclusion for weeks, months and even years during the pendency of administrative and court proceedings when the school district could provide alternatives or modifications to the child's program is to excuse system failure by projecting blame onto the student.

### B. Educational Policy Dictates Positive Alternatives To Exclusionary Practices

Suspension and expulsions are the traditional disciplinary tools used by school districts to remove disruptive students. Children's Defense Fund, Children Out Of School In America. Washington, D.C. (1974) at 118. However, the majority of disciplinary suspensions do not arise out of emergency



situations. Grosenick and Huntze, Review and Update of Legal Status," supra, at 3. The results of an extensive national survey show that 63.4 per cent of school suspensions were for offenses not considered dangerous. Children's Defense Fund. School Suspensions: Are They Helping Children? Washington, D.C. (1978) at 12. Of the little more than one-third of the students suspended for "dangerous" acts, it is unclear how many of these really involved emergencies that could not be dealt with in school.12/

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12/ Children's Defense Fund concluded from an analysis of statistical sources on school violence that studies on the subject were suspect because of ambiguous definitions and flawed methodology. Children's Defense Fund, School Suspensions: Are They Helping Children, supra at 18. The Survey indicated that black children were suspended at twice the rate of white children. Latter OCR data confirms this conclusion. U.S. Dept. of Education, Office of Civil Rights, 1984 Elementary and Secondary Schools Civil Rights Survey (1986).

Positive alternatives to suspensions of handicapped students are described in much of the behavioral and educational literature. Grosenick and Huntze in Positive Alternatives To The Disciplinary Exclusion of Behaviorally Disordered Students, have collected a number of representative articles on non-exclusionary interventions for disruptive handicapped students. Grosenick and Huntze, Positive Alternatives, supra. In examining such alternatives, the editors state "our goal must be to seek alternatives that not only retain these children in school but also improve their behavioral functioning." Id. at 10.

Litigation in Florida challenging the expulsion of handicapped students for misconduct, S-1 v. Turlington, 635 F. 2d 342 (5th Cir.



1981), cert. denied 454 U.S. 1030 (1981), has had a pervasive impact on state policies and local practice. As a result of the litigation the state now encourages a range of options for school personnel as positive alternatives to disciplinary suspensions. Guetzloe and Wells, Utilizing the IEP: Florida's Answer To The Exclusion of Behaviorally Disordered Students, in Positive Alternatives To The Disciplinary Exclusion of Behaviorally Disordered Students, supra at 42. The Florida Bureau of Education for Exceptional Students (BEES) advises school districts to consider the following alternatives: provision of additional related services, such as diagnosis and evaluation, counseling, medical services, parent counseling, parent training, a change of disciplinary procedures or organizational

structure within the same special education program, and increased time in special education programs. Id. at 56.

Project PASS (Positive Alternatives to School Suspension) in Florida emphasizes a number of methods and strategies that manipulate the physical environment and resources in place of out of school suspensions. They include inservice training with follow up consultations with staff, parent training activities, a supervised time-out room where a student can "cool-off," talk about problems and consequences with a "facilitative listener" and explore alternative ways of responding to stress or provocation. This room also can serve for short periods as an in-school suspension room with on-site counseling and opportunities to work on education assignments. Id. at 58. "Because



prolonged isolation or segregation from the education program is considered detrimental, students are returned as quickly as possible to their regular classes. School staff are kept informed of their progress while in the Time-out Room." Id. Conferences, counseling and group work are provided for students who are spending more than three class periods per day in the Time-out Room. Intensive intervention is provided by a school psychologist and a social worker for students who are having difficulty developing acceptable social behaviors. These staff are also available to work with other personnel at the school and the parents. Innovative courses are also offered to students such as "A Student's School Survival Course" and "A Student's Home Survival Course." Id.; See also Crawford, In-School Suspension: A

Positive Alternatives To Disciplinary Exclusion, in Positive Alternatives To The Disciplinary Exclusion of Behaviorally Disordered Students, supra.

Other educators have used additional interventions such as detention and counseling centers, ombudsman programs, Saturday Schools, and work study and vocational programs to deal with students who have difficulty conforming their behavior to the structure of the classroom. Guetzloe and Wells, supra, at 83-84. It should be noted that contrary to petitioner's claim that the provision of an aide to "guard" John Doe is inappropriate in a school environment, Pet. Brief at 11, the use of aides and other paraprofessionals is encouraged in the programs described in the literature. Forness, Sinclair and Russell, supra, at 25.



Other educators and researchers have described the same approaches, or variations on these approaches, as alternatives to suspension. Peterson and Rosell, supra, at 25; Harootunian, B. School Violence and Vandalism, in School Violence, (Apter & Goldstein, eds.) (1986); Lichtenstein, Suspension, Expulsion, and the Special Education Student, Phi Delta Kappan, 1980, 459-461. If we allow suspension to replace education, the school districts will have no motivation to explore these alternatives and adjust school programs to meet the needs of the children.

In light of the EHA's provisions for program and personnel development, and the requirement of appropriate individualized education programs, failure to implement state of the art methods is an unacceptable excuse

for excluding disruptive students. In the years preceding the passage of the EHA, many programs for mentally retarded children were merely custodial. In the twelve years since the Act's passage state of the art in educating mentally retarded children has gone through a very significant evolution. Had the law excepted these children from the Act's requirements, this evolution would not have occurred. Likewise, indefinite suspensions do nothing to motivate the system to train personnel and develop and implement appropriate programs.

## IV. Conclusion

Indefinite or long-term suspensions mean the loss of invaluable educational time and services and deprive the child of a context for developing socially acceptable behavior. The system must move forward to embrace positive



alternatives which advance inclusion instead of exclusion, as Congress intended when it enacted Pub. L. 94-142. Congress' effort would be defeated if students could be indefinitely suspended by school officials for behavior related to their handicaps because the system has failed to meet their needs.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

(13)

No. 86-728

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

*Petitioner*,

—v.—

JOHN DOE and JACK SMITH,

*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## *AMICUS CURIAE* BRIEF FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, JUVENILE RIGHTS DIVISION IN SUPPORT OF RESPONDENTS

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No. 86-728

IN THE
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OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

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v.

JOHN DOE and JACK SMITH,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

# AMICUS CURIAE BRIEF FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, JUVENILE RIGHTS DIVISION IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICUS CURIAE

The Legal Aid Society is a private, non-profit legal assistance organization which since 1876, has provided quality legal

representation to persons living in New York City who cannot afford to employ other counsel. The Society has a full-time staff in excess of 800 attorneys, who provide legal counsel to approximately 250,000 people a year in all trial courts in New York City, in the state and federal appellate courts and in this Court.

Amicus curiae, the Juvenile Rights Division of The Legal Aid Society, was created in 1962 at the same time that the New York State Legislature enacted the Family Court Act and mandated the assignment of counsel in juvenile proceedings. The Juvenile Rights Division is the single largest organization in the United States to provide direct legal representation to children. At present, it comprises 90 trial, appellate and special litigation attorneys and a social services support staff of 36, including 3 full-time educational consultants.

The Juvenile Rights Division's primary responsibility is the representation of



juveniles who are the subject of Family Court proceedings in New York City. In 1986, Juvenile Rights Division lawyers (referred to by state statute as "law guardians") were assigned as counsel in approximately 22,000 proceedings, including cases involving juvenile delinquency, status offenses, and child abuse and neglect. In many of these proceedings, the children whom the Division represented were handicapped and in need of special education.

The Division has had extensive practical experience representing handicapped children in a variety of school-related proceedings, including disciplinary hearings, impartial due process hearings and individualized education planning conferences. In addition, the Division's Special Litigation Unit has initiated federal class action lawsuits to enforce the rights of handicapped children. See, e.g., Lora v. Board of Education of the City of New York, 456 F. Supp. 1211 (E.D.N.Y. 1978), aff'd in part, vacated and remanded in

part 623 F.2d 248 (2d Cir. 1980), on remand 587 F. Supp. 1572 (E.D.N.Y. 1984); Andre H. v. Ambach, 104 F.R.D. 606 (S.D.N.Y. 1985).

Amicus is vitally concerned about the quality of education provided to handicapped children in this nation's public schools. To this end, amicus has maintained that handicapped children are entitled to an appropriate public education and should not be expelled or indefinitely suspended from school. Based on its experience, amicus is convinced that handicapped children can be educated appropriately within the public school system without resorting to the drastic steps of expulsion or indefinite suspension.

The central issue presented in this case - whether a local school district may indefinitely suspend or expel a handicapped child from the student's current educational placement during the pendency of review proceedings conducted pursuant to the Education of the Handicapped Act - is of great importance to the many handicapped children represented



by amicus. Amicus submits this brief because of its concerns about the impact of this case on its educationally handicapped clients. Consequently, amicus wishes to provide this Court with an analysis of the legal issues and the implications of a decision by this Court in this matter.

Amicus has received consent from both the petitioner and the respondents to file this brief.

## SUMMARY OF ARGUMENT

In enacting the Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1400 et seq., Congress intended that all handicapped children be provided with a free appropriate public education. To effectuate this substantive right, Congress required that local educational agencies develop and implement a panoply of procedural safeguards, including § 1415(e)(3)'s requirement that the child shall remain in his current educational placement during the pendency of EHA administrative or judicial proceedings.

While the stay-put provision does not explicitly refer to the application of a school district's disciplinary powers, the overwhelming majority of federal appellate and district courts that have confronted the issue have held that an indefinite suspension or expulsion of a handicapped child constitutes a change in educational placement. This conclusion is well-supported by the EHA's history, purposes, statutory scheme and language. Furthermore, the practical consequences of using such disciplinary practices, including relegation to a home-bound status, complete cessation in the provision of special education and related services and dramatic curtailment of opportunities for interaction with non-handicapped children, lead ineluctably to the conclusion that such measures constitute a change in educational placement.

The stay-put provision of § 1415(e)(3) had its genesis in Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F.



Supp. 1257 (E.D. Pa. 1971), supplemented and modified 343 F. Supp. 279 (E.D. Pa. 1972) ["PARC"] and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) ["Mills"]. The drafters of § 1415 were fully cognizant of the orders in these cases and believed that they established the minimum procedures that the Due Process Clause required. Section 1415 was enacted to ensure that nation-wide handicapped children would get at least these constitutionally required procedural protections.

Mills and PARC ordered that all handicapped children be given access to an appropriate public education, regardless of the severity of their handicap, and Mills specifically addressed those children whose handicap caused them to be serious behavior problems in school. With some limitations, Mills and PARC allowed a handicapped child to remain in his current educational placement pending the outcome of a hearing arising from

conduct attributable to his handicap. Congress intended the stay-put provision of § 1415(e)(3) to apply in these situations also. Therefore, § 1415(e)(3) permits handicapped children to remain in their current educational placement pending a final decision in an EHA review proceeding concerning a proposed change in placement, including exclusion from school, that resulted from conduct related to the child's handicap.

When it enacted § 1415, Congress modified some of the features of the procedural safeguards required by Mills and PARC by simplifying them and expanding their application. The specific changes Congress chose to make to the Mills and PARC procedures persuasively demonstrate that Congress did not intend the courts to add exceptions to the stay-put provision of § 1415(e)(3).

Section 1415 represents a balance of the interests of the handicapped child, his parents and the school district. There is no need to engraft exceptions onto it. A short-



term suspension that lasts only until the child's behavior is sufficiently under control so he is not a danger to himself or others is not a change in educational placement. If the school officials believe that returning the child to his current educational placement will irreparably harm him or the other students, they may seek preliminary injunctive relief from the operation of § 1415.

Furthermore, the handicapped child may suffer educational, psychological, emotional or social developmental harm as a result of long-term exclusion from school. Indefinite suspension or expulsion may intensify the handicapped child's feelings of alienation and helplessness and increase socially unacceptable acting out behavior. Long-term interruptions may result in academic, emotional and developmental regression. None of these effects is consistent with the aims of the EHA.

Therefore, amicus urges this Court to hold that an indefinite suspension or expul-

sion of a handicapped child constitutes a change in educational placement within the meaning of the EHA and hold that Congress intended that § 1415(e)(3)'s stay-put requirement prevent school officials from indefinitely excluding a handicapped child from his current educational placement during the pending of review proceedings conducted pursuant to the EHA.

## ARGUMENT

### I.

### EXPULSION OR INDEFINITE SUSPENSION OF A HANDICAPPED CHILD DURING THE PENDENCY OF REVIEW PROCEEDINGS CONDUCTED PURSUANT TO THE EDUCATION OF THE HANDICAPPED ACT CONSTITUTES A CHANGE IN EDUCATIONAL PLACEMENT.

Congress' purpose in enacting the Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1400 et seq., was:

> to assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected.



20 U.S.C. § 1400(c).

In order to receive federal monies, each participating State is required to have in effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). A "free appropriate public education" is defined in the EHA to mean:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18).

The linchpin of the EHA is the individualized education program (IEP), which is a written statement of a handicapped child's educational needs and the specially designed instruction, related services and educational

placement needed to meet those needs. 20 U.S.C. § 1401(19). The IEP is developed jointly by appropriate school personnel and the child's parent. Parental participation in the development of a handicapped child's educational program and the monitoring of its effectiveness is stressed throughout the EHA. 20 U.S.C.§§ 1400(c), 1401(19), 1415(b)(1)(A), (C),(D),(E), 1415(b)(2), and 1415(e)(3).

To effectuate the EHA's substantive rights, Congress required local educational agencies to establish and maintain an elaborate set of procedures "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of [a] free appropriate public education." 20 U.S.C. § 1415. These procedures include the right to written prior notice when an educational agency proposes to initiate or change a child's educational placement or the provision of a free appropriate public education



and the right to challenge in administrative and judicial proceedings any matter relating to the educational placement or the provision of a free appropriate public education to a child. 20 U.S.C. §§ 1415(b)(1)(C); 1415(b)(1)(E); 1415(b)(2); 1415(c),(d),(e). These procedures are intended to assure parental participation and to enable parents to challenge educational decisions that they deem to be inappropriate. As this Court has observed "the importance Congress attached to these procedural safeguards cannot be gainsaid." Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176, 205 (1982) ["Rowley"].

As an additional procedural safeguard, the EHA commands that:

> during the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child....

20 U.S.C. § 1415(e)(3). The directive contained in § 1415(e)(3) is plain and unambiguous. By its terms, this section limits the discretion of school officials in unilaterally changing the educational placement of a handicapped child during the pendency of EHA review proceedings and only authorizes a change in educational placement when the child's parent or guardian agrees.

Once a child's parent has initiated a proceeding under § 1415 by presenting a complaint as to a proposed change in educational placement or the provision of a free appropriate public education, the child has the right to remain in the current educational placement. This stay-put requirement is one of the important procedural protections designed by Congress to prevent the exclusion of handicapped children from this nation's public schools.

Viewed in a historical perspective and examined in light of the EHA's major purposes, it is easy to understand why § 1415(e)(3)



must be interpreted strictly to prevent school officials from removing handicapped children from the public schools while EHA review proceedings are being conducted. The sequence of events culminating in the passage of the EHA demonstrates that Congress intended to prevent expulsion of handicapped children from the public schools.

The EHA was enacted following two landmark federal district court decisions, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), supplemented and modified 343 F. Supp. 279 (E.D.Pa. 1972)["PARC"] and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) ["Mills"],[1] which concerned "the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from the public schools." Burlington School Committee

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1 For a more extensive analysis of the Mills and PARC cases and the relevant legislative history, see Point II.

v. Department of Education, 471 U.S. 359, 373 (1985) ["Burlington"]. In direct response to PARC and Mills, Congress drafted § 1415(e)(3), the status quo or stay-put procedural provision, one purpose of which is "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." Burlington, 471 U.S. at 373.

A second purpose of the status quo guarantee, consistent with the EHA's overall objective of providing a free appropriate public education, is to maintain stability and continuity in the handicapped child's educational placement, program and services during the pendency of EHA review proceedings. Without this safeguard, school officials could invoke their disciplinary powers to expel or indefinitely suspend a handicapped child from school for years while the child's parents attempted to have the school official's decision overturned and the child



readmitted. Such a result would subvert two of the principal purposes of the EHA - to provide a free appropriate public education to a handicapped child and to encourage and maximize parental participation in the development of the child's educational plan.

Section 1415(e)(3) does not specifically refer to the use of a school's disciplinary procedures. However, in light of the EHA's overarching purpose - to provide a free appropriate public education to all handicapped children - the conclusion is irrefutable that the stay-put provision applies, at least, to a school system's use of long-term disciplinary practices, such as expulsion and indefinite suspension.

At the time of the EHA's passage, Congress was well aware of and concerned about the widespread use of disciplinary sanctions as a means of excluding handicapped children from the public schools. When drastic disciplinary measures such as expulsion or indefinite suspension are proposed or initiated, a

change of educational placement or a change in the provision of a free appropriate public education occurs within the meaning of the EHA. If the result were otherwise, school officials could use expulsion or indefinite suspension to terminate the provision of special education services to handicapped children. This would clearly frustrate the dominant objective of the EHA.[2]

Virtually every court that has addressed the issue has concluded that an expulsion or indefinite suspension of a handicapped child from school for disciplinary reasons repre-

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2 The relevant implementing regulation, 34 C.F.R. § 300.513, essentially restates, without clarification, the essence of the stay-put statutory requirement. However, the comment to the regulation states that where a child endangers himself or others, school officials may use their normal procedures in dealing with that student provided the action taken does not represent a change in placement. A fair reading of this comment suggests that school authorities may employ temporary emergency procedures to deal with a dangerous child but may not immediately impose long-term disciplinary sanctions, including expulsion or indefinite suspension, that would amount to a change in educational placement.



sents a change in educational placement. School Board of the County of Prince William, Virginia v. Malone, 762 F.2d 1210 (4th Cir. 1985); Kaelin v. Grubbs, 682 F.2d 595, 599-602 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), cert. denied, 454 U.S. 1030 (1981); Doe v. Koger, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979); Sherry v. New York State Education Department, 479 F. Supp. 1328 (W.D.N.Y. 1979); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978) Moreover, the lower courts have held that even when less drastic disciplinary measures are taken, such as placing a handicapped child on home instruction, that, too, constitutes a change in educational placement. Lamont X v. Quisenberry, 606 F. Supp. 809, 813-814 (S.D. Ohio 1984).[3]

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3 Petitioner admits that removing a child from a regular classroom and providing educational services of a different type in a different setting represents a change in placement. Petitioner's brief at p.12, n.17. By a parity of reasoning, an indefinite suspension or expulsion, which terminates special education services completely, must

Expulsion or indefinite suspension is a change in educational placement and a change in the provision of a free appropriate public education to a handicapped child. In all probability, the handicapped child is relegated to a home-bound status permanently or for an extended period of time. A complete cessation in the provision of educational services occurs. Neither special education nor related services are provided. Implementation of the child's IEP is interrupted. Consistency and continuity in the handicapped child's education is lost.

The handicapped child is totally removed from the current educational placement

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constitute a change in educational placement. To the extent that amici supporting petitioner contend otherwise, their arguments are contrary to the overwhelming weight of authority and common sense. Furthermore, the Ninth Circuit observed that the San Francisco Unified School District conceded that the half day reduction in respondent Smith's schedule constituted a change in placement. Doe by Gonzales v. Maher, 793 F.2d 1470, 1491 (9th Cir. 1986). A fortiori, an expulsion or indefinite suspension must be a change in educational placement within the meaning of the EHA.



and deprived of contact with his peers. All opportunities for mainstreaming or interaction with non-handicapped students in the educational environment are terminated. The months or years that the child is deprived of schooling are forever lost and cannot be retrieved. Under these conditions, little doubt exists that an expulsion or indefinite suspension constitutes a change in educational placement or a change in the provision of a free appropriate public education.

To conclude that expulsion or indefinite suspension constitutes a change in educational placement does not mean that school officials are without any recourse to deal with emergency situations. Where a handicapped child has exhibited dangerous behavior, school officials may invoke their short-term suspension powers to remove the child temporarily from the educational environment. Such a brief interruption in the provision of special education services would not necessarily rise to the level of a change in ed-

ucational placement or a change in the provision of a free appropriate public education. Furthermore, it is conceivable that minor variations in the child's educational program or related services, such as changing the child's teacher, classroom, or school site, provided the proposed program and services were substantially equivalent to the current program and services, would not constitute a change in educational placement.

In conclusion, the Court of Appeals for the Ninth Circuit was correct in holding that expulsion and exclusion constitutes a change in educational placement. Doe by Gonzales v. Maher, 793 F.2d 1470, 1482-1483 (9th Cir. 1986). A contrary conclusion would be fundamentally at odds with the practical consequences associated with long-term exclusion from the school system and would be inconsistent with the EHA's major purposes.



II.

**CONGRESS INTENDED THE STAY-PUT PROVISION OF SECTION 1415(e)(3) TO APPLY PRIOR TO A FINAL DECISION ON A COMPLAINT THAT A CHILD SHOULD NOT BE EXCLUDED FROM SCHOOL FOR CONDUCT RELATED TO HIS HANDICAP. SCHOOL DISTRICTS HAVE MEANS OTHER THAN EXCLUDING A HANDICAPPED CHILD FROM SCHOOL PENDING SUCH A DECISION THAT ARE ADEQUATE TO PROTECT THEIR INTERESTS AND THE INTERESTS OF THE OTHER STUDENTS.**

The drafters of the EHA believed that Mills and PARC set the standard for handicapped children's entitlement to an appropriate public education and for the minimum protections to which these children were entitled. One of the procedural safeguards that the plaintiffs won in both Mills and PARC was a stay-put provision that kept a handicapped child in his current placement when his parent objected to a proposed change in the placement. These stay-put protections applied when a child was excluded from school because of conduct attributable to his handicap, but they had exceptions for dangerous conduct or extraordinary circumstances.

When Congress enacted the EHA, it intended the § 1415(e)(3) stay-put provision to apply in the same situations as the ones in Mills and PARC, including exclusions from school for handicapped children. But Congress went beyond what the courts thought was constitutionally necessary to protect handicapped students during the review process on a change in educational placement and chose not to incorporate the Mills and PARC exceptions. Congress' decision is persuasive evidence that it did not intend that a dangerousness or extraordinary circumstances exception be implied into the § 1415(e)(3) stay-put provision.

Section 1415 represents Congress' judgment that it is more important to ensure the continuity of a handicapped child's education and protect the parental role in selecting the child's appropriate educational placement than it is to maintain school officials' traditional authority to make educational decisions. It would be an unwarranted intru-



sion into the legislative domain for this Court to disregard this judgment.

Furthermore, school officials do not need to circumvent the § 1415(e)(3) stay-put provision in order to maintain a safe school environment. They can use short-term suspensions that last only until the child is no longer an imminent danger to himself or others. They also have recourse to the courts if returning the child to his current educational placement after the short suspension period would cause irreparable harm to the other students, the teachers or the handicapped child himself.

### A. The Legislative History of § 1415 Establishes that Congress Did Not Contemplate Any Exceptions to the Stay-Put Provision.

#### 1. The historical context in which the EHA was enacted.

Congress first required states to establish procedural protections for handicapped children in 1974. Participating states were mandated to give the parents of handicapped

children an opportunity for an "impartial due process hearing" to challenge decisions "regarding identification, evaluation, and educational placement of handicapped children." Education Amendments of 1974, P.L. 93-380, § 612(d)(13), 88 Stat. 484. The statute did not specify what constituted an "impartial due process hearing." It also did not require states to provide an appropriate public education to all handicapped children.

As this Court has recognized, Mills and PARC were the impetus for the passage of the EHA. Burlington, 471 U.S. at 373. These cases were perceived as dictating the minimum level of educational entitlement and the types of procedures that had to be made available to handicapped children. 121 Cong. Rec. 19485, 25535, 35540, 37027; Sen. Rep. 94-168, 94th Cong., 1st Sess. 6, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1430. In Rowley, 458 U.S. at 194, the Court stated:



> The fact that both PARC and Mills are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act.

(Footnote omitted.)

During the debate on the original Senate version of the EHA (S.6), Senator Williams, the author of the bill, specifically cited Mills and PARC and quoted a passage from Mills that declared that handicapped children have a right to an appropriate public education regardless of the severity of their handicap. 121 Cong. Rec. 19485. See also 121 Cong. Rec. 37027 (Sen. Gude). Congress adopted this principle through its requirement that all handicapped children be provided with a free appropriate public education. Rowley, 458 U.S. at 181 n.5; 20 U.S.C. § 1412(2)(B).

Mills and PARC are the specific sources for § 1415(e)(3).[4] Reading § 1415(e)(3)

4 Mills and PARC were the guiding principles for Senator Williams and Representatives Miller and Jeffords, who were primarily responsible for the

with reference to Mills and PARC shows that Congress intended it to apply to EHA review proceedings arising from conduct related to the child's handicap.

In PARC, the court required the school district to provide notice and an opportunity for a hearing prior to a "change in educational status" of any mentally retarded child. A "change in educational status" was defined as "any assignment or re-assignment based on the fact that the child is mentally retarded ... to no assignment ...." 343 F. Supp. at 303 (emphasis supplied). Thus, an exclusion from school would have been a "change in educational status."

By "based on the fact that the child is mentally retarded," the court was referring

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procedural protections added by the conference committee, including the stay-put provision. 121 Cong. Rec. 19485, 25540, 23705. (Representatives Miller's and Jeffords' role in developing the due process procedures was referred to at 121 Cong. Rec. 37025, 37027 and 37418.) The stay-put provision was added in order to refine and strengthen the existing law. 121 Cong. Rec. 37415-16.



to the child's characteristics that are attributable to his retardation. Some of these characteristics are irritability, aggressivity and temper tantrums, which are likely to cause serious disciplinary problems in school. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980)["DSM-III"] at 37; see Lamont X v. Quisenberry, 606 F. Supp. 809, 818 (S.D. Ohio 1984).

The hearing process required by PARC when the school district sought to change a child's educational status included the following stay-put provision:

> There shall be no change in the child's educational status without prior notice and the opportunity to be heard as set forth herein, except that in extraordinary circumstances the Director of the Bureau of Special Education, upon written request to him by the district or intermediate unit setting forth the parent [sic], may approve an interim change in educational assignment prior to the hearing, in which event the hearing will be held as promptly as possible.

343 F. Supp. at 305 (emphasis supplied).

This stay-put requirement would apply when the school district sought to exclude a mentally retarded child from school because of aggressivity or temper tantrums which were attributable to the child's retardation.

In Mills, the court found:

> Not only are plaintiffs and their class denied the publicly supported education to which they are entitled many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing .... Due process of law requires a hearing prior to exclusion, termination of [sic] classification into a special program.

348 F. Supp. at 875 (emphasis supplied). Of the seven named plaintiffs, three were excluded from school because of previous behavior problems in class. Like mental retardation, other handicapping conditions, including non-psychotic disorders, are likely to produce behaviors that are unacceptable to school officials.[5]

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5 A primary example of this type of handicap is the Conduct Disorder, which is characterized by "a repetitive and persistent pattern of conduct in which



The court in Mills created two types of hearing procedures and included a stay-put requirement in each. The first procedure applied when a child was "placed in, transferred from or to, []or denied placement in a" special education program. 348 F. Supp. at 880. The school district could not take any of these actions pending the decision by the Hearing Officer if the parents objected. 348 F. Supp. at 881. No exceptions were allowed.

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either the basic rights of others or major age-appropriate societal norms or rules are violated." DSM-III at 45. The Aggressive subtype of this disorder is characterized by a repetitive and persistent pattern of aggressive physical violence. Id.

Other non-psychotic disorders are also associated with conduct that would be considered a serious discipline problem in school, such as chronic violations of important school rules, DSM-III at 46 (Conduct Disorder, Nonaggressive type); outbursts of aggressive behavior, DSM-III at 60 (Schizoid Disorder of Childhood or Adolescence [not Schizophrenia]); obstinacy, low frustration tolerance and temper outbursts, DSM-III at 42 (Attention Deficit Disorder with Hyperactivity); a pattern of disobedient and provocative opposition to authority figures, DSM-III at 63 (Oppositional Disorder).

The school district was also prohibited from:

> on the grounds of discipline, caus[ing] the exclusion, suspension, expulsion, postponement, inter-school transfer, or any other denial of access to regular instruction in the public schools for more than two days [without a hearing] ...

Id. Under the disciplinary hearing procedure, a child's educational placement could not be changed pending the hearing and receipt of the decision unless the principal "warrant[ed] that the continued presence of the child in his current program would endanger the physical well-being of himself or others." 348 F. Supp. at 883.

The circumstances of the three named plaintiffs and class members who had been excluded from school because of their in-class conduct, establishes that the court in Mills intended the ordered protections to apply to the removal of a child from school because of handicap-related behavior.



**2. The choices Congress made in drafting § 1415(e)(3).**

Congress chose to extend the right to a free appropriate public education to all handicapped children, including those who are seriously emotionally disturbed, regardless of the severity of their handicap. Rowley, 458 U.S. at 181 n.5; 20 U.S.C. §§ 1401(1), 1412(2)(B) and (C), 1414(a)(1)(A). Many mental disorders are defined by or associated with behaviors that create serious disciplinary problems in school. (See discussion supra at 29-31.) "In one sense, the risk of [further violent] outbursts is the risk of assuming responsibility ... for educating severely behaviorally handicapped children." Lamont X v. Quisenberry, 606 F. Supp. at 818 (footnote omitted).

The drafters of § 1415 indicated a strong desire to accord handicapped children all protections required by the Due Process Clause, and they relied on Mills and PARC to decide what procedures were necessary to accomplish this end. (See discussion supra at

26-28.) However, Congress adopted neither the two-procedure system or the dangerousness exception of the Mills stay-put provision nor the PARC "extraordinary circumstances" exception. Rather, it chose a single process with a stay-put provision that was unconditional unless the parents agreed to a change in educational placement pending a final decision on their complaint. Thus, there is no basis on which to infer that Congress intended to incorporate an extraordinary circumstances or other exception to § 1415(e)(3).

Because the Mills and PARC stay-put provisions operated pending a decision on a hearing whether to discipline, transfer, suspend or expel a child because of conduct that was related to his handicap, the stay-put provision of § 1415(e)(3) must also be applied in these situations. Contrary to petitioner's position before this Court, it is unnecessary to imply a dangerousness exception into § 1415(e)(3). Brief for Petitioner, at 5-14. As the Ninth Circuit noted in



the decision below, in "extraordinary circumstances" a school district can seek judicial relief when § 1415 is "inadequate to cope with truly exigent circumstances." Doe by Gonazles v. Maher, 793 F.2d 1470, 1486 (9th Cir. 1986).

**B. A School District Cannot Unilaterally Change a Handicapped Child's Educational Placement Pending a Hearing, but Must Obtain Judicial Relief from the Stay-put Provision.**

In drafting § 1415, Congress balanced the interests of the handicapped child in getting a free appropriate public education, of the child's parents in participating in the development of an educational program and of the school district in maintaining a safe environment, selecting appropriate teaching methods and maintaining order and discipline in classrooms. Representative Brademas, the principal manager of H.R. 7217, the House version of the EHA, stated:

> ... finally there are a number of procedural safeguards in this legislation which are designed to fur-

> ther the congressional goal of insuring a full educational opportunity for all handicapped children. It was my desire to establish these procedures and safeguards without overburdening local school districts and State educational agencies. I think we have been able to do this.
>
> I believe that the conference report quite properly recognizes the rights of handicapped children and their parents while at the same time insures that these rights will be respected without demanding unnecessary and time-consuming action on the part of our local schools.

121 Cong. Rec. 37025.

This Court has said that the essence of Mills, PARC and the EHA is that handicapped children must be given access to a free appropriate public education. Rowley, 458 U.S. at 193. Access must be meaningful, and to be such, it must take into account the characteristics of the child's handicap.[6]

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6 Meaningful access to the public education system does not mean that handicapped children are to be treated the same as non-handicapped students. As Senator Javits observed during the debate on the EHA, handicapped children's "universe of need" is different from that of their non-handicapped peers, and the EHA should recognize and accommodate those differences. 121 Cong. Rec. 19495, 23709 (Rep. Biaggi made a similar observation). See Rowley, 458 U.S. at 193, 199.



Congress also recognized handicapped children's need for continuity in their education. It balanced this need against the practical problems a district faces when the school officials and parents disagree about a child's placement. Senator Williams indicated that the stay-put provision was adopted, in part, because Congress recognized that,

> ... delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development.

121 Cong. Rec 37416.

A unilateral administrative decision to exclude a child from school for conduct related to his handicap unnecessarily interrupts his education and fails to accommodate the characteristics that are attributable to the handicap. It, therefore, deprives the child of meaningful access to a free appro-

priate public education. It also violates Congress' intent that parents participate in deciding what a handicapped child's educational placement should be.

Congress made parental participation a central theme in the whole process of educating handicapped children. Burlington, 471 U.S. at 368.

> ... Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley, 458 U.S. at 205. It defined the critical term "free appropriate public education", in part, by reference to what is contained in the IEP, and the parents are full participants in drafting a child's IEP. 20 U.S.C. § 1401(18) and (19).[7]

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7 The Senate thought the IEP and parental participation were so important that S.6 originally called for three IEP conferences per year. 121 Cong. Rec. 19508 [§ 614(4)]. H.R. 7217 provided that the IEP would be developed in consultation with the



Congress' reliance on Mills in drafting § 1415 indicates that it weighed the interest of school districts in maintaining a safe environment. Congress also considered school districts' traditional control over educational decisions and discipline. Rowley, 458 U.S. at 207, 208 n.30.

It cannot be disputed that school officials have an obligation to provide a safe environment for all school children. There seems to be little question that at the point a child is exhibiting dangerous behaviors, the school district has the power to remove him from a situation in which he is likely to harm another student, a teacher or himself. This type of removal would be for a very short period of time, such as five days. E.g., Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982); Doe v. Koger, 480 F. Supp. 225

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parents, 121 Cong. Rec. 25544 [§ 6(a)(19)], but the House receded. As enacted, the EHA makes the parents full participants in the IEP meeting. 20 U.S.C. § 1401(19).

(N.D. Ind. 1979); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978).

Once the emergency is over, there is no reason to continue the suspension. To do so would not serve the safety interests of the other students or the faculty. It would, however, defeat the EHA's purpose of providing a free appropriate public education to all handicapped children.

School officials have traditionally made decisions based on their own judgment without interference from parents or other non-teaching sources. However, the EHA removed some the the authority to make decisions about "the educational method most suitable to the child's needs" from the hands of school officials and lodged it with the child's parents. Rowley, 458 U.S. at 207, 208 n.30.

Some school officials argue that they must be able to expel or exclude a handicapped child from school in order to teach him that certain conduct will not be tolerat-



ed, even when that conduct is a manifestation of his handicap and his parents object to the change in placement. But this situation is precisely the same as when school officals want to place a learning disabled child in a special class in order to teach him to read despite the parent's objection to the placement. In both cases the school district is attempting to impose its judgment on the child and his parents.

The EHA precludes this type of unilateral action by a school district. The notice requirements and procedural safeguards in the EHA were specifically designed to prevent school officials from changing a handicapped child's placement in opposition to the parent's wishes on the ground that they were exercising their professional judgment. Burlington, 471 U.S. at 373.

Finally, school officials often seek to eliminate the disruption a handicapped child's acting out causes to classroom routine by excluding him from class. However,

the EHA requires the school district to provide a free appropriate public education to all handicapped children, including "seriously emotionally disturbed" children, 20 U.S.C. § 1401(1), regardless of the severity of their disability. This mandate encompasses children whose handicap causes them to act aggressively or violently or creates a risk that these behaviors will recur.

Section 1415(e)(3) reflects Congress' judgment that it is more important to keep a handicapped child in his current placement than to ensure that the class will not be disrupted because the child exhibits the characteristics of his handicap. See Burlington, 471 U.S. at 373. ("We think at least one purpose of § 1415(e)(3) was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings.") And the stay-put provision is as applicable to children whose handicap produces maladaptive behaviors as to



retarded, orthopedically impaired or blind children. 20 U.S.C. § 1401(1).

It is apparent that the conferees weighed the countervailing interests of the handicapped children, the parents and the school districts, and § 1415 represents their judgment on how those interests should be balanced. This Court cannot disregard the balance struck by Congress by implying exceptions into § 1415(e)(3).

Moreover, it is not necessary to allow a school district to make a unilateral administrative decision to exclude a student for behavior related to his handicap pending a final decision on a § 1415 hearing in order to protect any of the interests described above. These interests will be adequately protected if, when a child's handicap-related conduct poses a danger to himself or others, the school officials: (1) use a short suspension that lasts only until the child's behavior no longer poses an immediate danger to himself or others; (2) during the suspension,

convene an IEP meeting, including the child's parents, to determine whether the child's educational placement should be changed and the nature of the new placement; (3) initiate the new placement if the parents do not object or return the child to his current placement if the parents do object to the new placement; and (4) initiate a court action seeking preliminary injunctive relief from the stay-put provision if the officials believe that returning the child to his current placement would cause him or the other students irreparable harm.

A state court of general equity jurisdiction or a federal district court would have jurisdiction over such an action, and exhaustion of administrative remedies would be futile and, therefore, unnecessary. See Smith v. Robinson, 468 U.S. 992, 1014 n. 17 (1984). It is imperative that the school district, not the parent, be required to bring the action and bear the burden of proof on why the child should not be returned to his



current placement pending a decision on the merits of the § 1415 proceeding.

The stay-put provision was designed to obviate the need for parents to hire counsel and bring an action in order to keep their child in his current placement. It was enacted to decrease the value of the "ratural advantage[s]" school officials always have in disputes with parents. Burlington, 105 S. Ct. at 2002. Some of those advantages are ready access to counsel, experts and, in most cases, sufficient funds to support litigation. It would be diametrically opposed to the purpose and intent of § 1415 to place the obligation on the parents to enforce the mandate of § 1415(e)(3) through litigation and to require them to bear the burden of showing that their child will be irreparably harmed if he is not returned to that placement.

Congress intended the § 1415(e)(3) stay-put provision to apply when a school district seeks to change a handicapped child's educational placement by excluding him from school

because of his handicap-related conduct. Contrary to petitioner's argument, there is no support in the legislative history or logic for engrafting a dangerousness or exceptional circumstances exception to the stay-put requirement. It should apply in all cases except when a school district can demonstrate to a court that other children or the handicapped student would be irreparably harmed if he were returned to his current educational placement pending a final decision in the EHA review procedure that determines the appropriate placement for him. Doe by Gonzales v. Maher, 793 F.2d at 1486.

III.

**LONG-TERM SUSPENSION OFTEN RESULTS IN EDUCATIONAL, PSYCHOLOGICAL, EMOTIONAL OR SOCIAL DEVELOPMENTAL HARM TO THE HANDICAPPED CHILD.**

Congress was cognizant of the harmful effects on handicapped students caused by their exclusion from school. In a statement



to the Senate, Senator Williams emphasized that: "[t]he interruption or lack of required education and related services can result in substantial setback to the child's development." 121 Cong. Rec. 37416 (1975).

Exclusion from school may cause psychological harm to the handicapped child. Children with emotional handicaps perceive cause and effect, the effect of their actions on their world, and the actions of others in a different way from their non-handicapped peers. Because the child's perceptions and responses are distorted by the very nature of the handicap, suspension often does not have the same meaning for the emotionally handicapped child as it does for the teachers and administrators imposing it.[8]

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8 For example, children with attention deficit disorders often exhibit impulsivity, lack of response to discipline, obstinancy, and low frustration tolerance. DSM-III at 41-42. A child with a conduct disorder "typically blames others for his or her difficulties and feels unfairly treated." DMS-III at 46. An oppositional disorder is marked by the persistence of the oppositional attitude even when it deprives the child of productive activity. If the child is asked to refrain from an act, he feels

> [An emotionally handicapped child is one] who because of organic and/or environmental influences, chronically displays (a) inability to learn at a rate commensurate with his intellectual, sensory- motor and physical development, (b) inability to establish and maintain adequate social relationships, (c) inability to respond appropriately in day to day life situations, and (d) a variety of excessive behavior ranging from hyperactive, impulsive responses to depression and withdrawal.

Apter, Troubled Children/Troubled Systems, at 11, 12 (1982)(emphasis added).

Often these children are incapable of making a connection between their actions, the effects of their actions, and the responses of others to those actions. This distortion of cause-effect connections can prevent the child from relating his exclusion from school to his own behavior. Inability to take responsibility for one's actions, poorly developed impulse control, and a tendency to see oneself as helpless before a

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obliged to carry it out. These children's behavior has continual confrontational quality, and they often have difficulties in school. DSM-III at 63-64.



hostile world are characteristics of the emotionally handicapped child. Id. at 11 (See p.50-51, supra n.10.). Exclusion from school by adults in authority positions may be integrated into the child's distorted perception of the world, and become additional proof that the distortion is the reality. Thus, suspension can intensify the child's feelings of alienation and helplessness and increase his socially unacceptable acting out behavior.

Handicapped children also lose more of their social development and cognitive skills while they are out of school than non- handicapped students. This regression occurs whether the student is excluded from school because of summer vacation or as a result of long-term suspension as a result of inappropriate behavior attributable to his handicap.

In a seminal decision in the education of handicapped students, a district court in Pennsylvania held that the denial of free publicly funded education in excess of 180

school days out of each year constituted a violation of the rights of five handicapped children and denied them and the class they represented appropriate education guaranteed under the EHA. Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), aff'd in part, remanded for further proceedings sub nom. Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, 452 U.S. 968 (1981), on remand 513 F. Supp. 425 (E.D. Pa. 1980).[9]

The district court in Armstrong heard extensive expert testimony on the effects of interruption or exclusion from school programming on the severely and profoundly impaired child (SPI), and the severely emotionally disturbed child (SED).[10] For SPI and

9 The Third Circuit approved the findings of the district court on the issue of the harmful effects of an interruption in the school year on the handicapped child.

10 The court defines "SPI children" as those whose I.Q. is less than 30. Battle v. Pennsylvania, 629 F.2d at 274. Profoundly retarded children are even more impaired. Mentally retarded children often exhibit aggressiveness, temper trantrums and



SED children, program breaks often cause regression and other types of harm. Id. at 596-7.

Interruption in the educational program of any child, handicapped or not, is likely to result in some regression. In fact, no individual at any age is capable of total retention of acquired skills and knowledge. But where such loss is minimal for the non-handicapped child who is capable of learning on his own, it is much more damaging to the handicapped student.

irritability. DSM-III at 37. They are three to four times more likely to have other disorders that are characterized by seriously maladaptive behaviors that present disciplinary problems in school. DSM-III at 37, 42, 87-88.

"SED children" are defined as those suffering from a variety of disturbances. This group includes children suffering from "autism, characterized by an inability to relate to and communicate with others, symbiosis, marked by an inseparable relationship with one other person, and schizophrenia which is characterized by strange relationships with other individuals and an inability to cope with reality." Battle v. Pennsylvania, 629 F.2d at 274. These disorders can also produce conduct that causes school discipline problems. DSM-III at 86-88, 90-91.

> SPI children usually learn at a much slower rate than non- handicapped children and have difficulty remembering what they learn. The lower functioning the child is, the quicker he or she will forget information and lose skills that are not practiced. Generalizing skills that are learned also presents problems for SPI children; they often do not recognize that they should use learned skills in an enviornment different than the one in which they were originally taught.

Id. at 588. SED children exhibit a similar regression in skill development, and they also experience a decline in emotional development. Id. at 595.

During vacations, the children in Armstrong regressed to such an extent that the time required to regain the lost skills and development was "so great that it render[ed] impossible progress and the learning required for reaching their otherwise obtainable goals of self-sufficiency." Id. at 592. Additionally, interruptions in programming were found to result in a decrease in appropriate behaviors and an increase in inappropriate behavior and emotional problems. Id. at 596.



A handicapped child excluded from school may also suffer harm in social development. See, Lamont X v. Quisenberry, 606 F. Supp. 809,817 (S.D. Ohio 1984); Stuart v. Nappi, 443 F. Supp. 1235, 1240 (D. Conn. 1978).

An important part of a child's development is learning to interact in a social way with his or her peers. In Hairston v. Drosick, 423 F. Supp. 180 (S.D.W.Va. 1976), the court recognized the importance of socialization and education in the lives of handicapped children. It found:

> A child's chance in this society is through the educational process. A major goal of the educational process is the socialization process that takes place in the regular classroom, with the resulting capability to interact in a social way with one's peers.... [P]lacement of children in abnormal environments outside of peer situations imposes additional psychological and emotional handicaps upon children which, added to their existing handicaps causes them greater difficulties in future life.

Id. at 183. The denial of the opportunity for socialization and education during their minor years "imposes added lifetime burdens upon handicapped individuals." Id.

The theory that suspension creates the desired effect, i.e., modifying behavior of disruptive students, rests on the belief that temporary exclusion motivates students to correct their behavior on their own. Massachusetts Advocacy Center, The Way Out: Student Exclusion Practices in Boston Middle Schools, at 59 (1986). Some handicapping conditions prevent suspension from having the desired effect on the handicapped student. (See discussion supra at 50-51, especially note 10.) The handicapping condition may also render the student incapable of self-correction and self-learning of cognitive skills.

Studies have shown that even non- handicapped students do not respond as expected to school suspension. The hands off or "get out" appproach, id. at 49, usually perpetu-



ates and even exacerbates a student's problems and behavior. Kaeser, Suspensions in School Discipline, 11 Education and Society, August, 1979, at 466. Inappropriate behavior is a common response to exclusion.

Long-term or repeated suspension frequently results in the child being labelled as a troublemaker, a label which can lead to more school failure, more suspension, and even to dropping out of school completely. Massachusetts Advocacy Center, supra, at 50. One negative experience leads to another, and soon the negative school experiences begin to outweigh the student's positive school experiences. In time, the student's diminished perception of himself and his abilities causes him to give up. Such frustration is often accompanied by the feeling that the school had first given up on him. See generally, Id. at 14. Generally handicapped children have a lower frustration level than their non-handicapped peers, and therefore the deleterious effects of long-term suspension are

often greater for a handicapped child.

In conclusion, exclusion from school has proven harmful to handicapped students. Although handicapped children suffer the same harms as their non-handicapped peers, e.g., feelings of rejection, self-doubt, frustration and ultimately defeat, these harms are magnified for the handicapped child. Furthermore, when a handicapped child is indefinitely suspended, his educational, psychological, emotional, and social developmental needs which require special attention are ignored, and the child's problems are compounded. When this occurs, the handicapped child's right to a free appropriate public education is denied and the primary purpose of the EHA is defeated.



**CONCLUSION**

For the foregoing reasons, amicus respectfully requests that this Court hold that an indefinite suspension or expulsion of a handicapped child constitutes a change in educational placement within the meaning of the EHA and hold that Congress intended § 1415(e)(3)'s stay-put requirement to prevent school officials from indefinitely excluding a handicapped child from his current educational placement during the pendency of review proceedings conducted pursuant to the EHA.

Dated: New York, New York
June 22d, 1987

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* Amicus gratefully acknowledges the assistance of Valerie Marvin, Rita Horvath, Ruth T'Kach and Gail Welt in the research and preparation of this brief.